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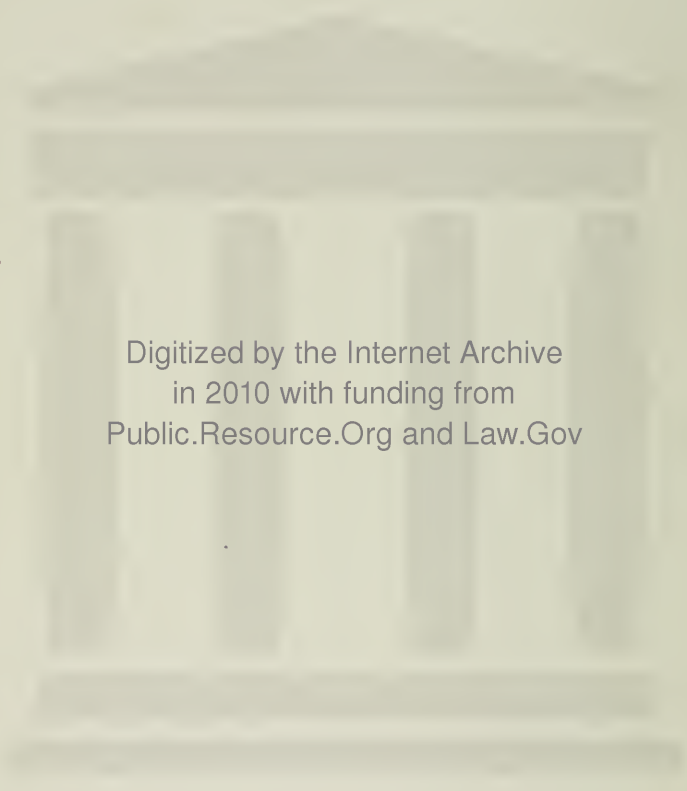
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2483
No. 11662-11666

see vol 2482
United States

Circuit Court of Appeals

For the Ninth Circuit.

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

IN FOUR VOLUMES

VOLUME IV

Pages 1267 to 1635

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

RALPH W. KIBBEE

a witness called by and on behalf of the defendant Himmelfarb, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Ralph W. Kibbee.

The Clerk: Your address?

The Witness: 1132 North Highland Avenue.

Mr. Katz: May I at this time, if the Court please, hand to the Court for information and guidance a schedule that has been prepared?

The Court: A copy of which you have handed to Government counsel?

Mr. Katz: A copy of which I have handed to Government counsel.

Direct Examination

By Mr. Katz:

Q. Mr. Kibbee, what is your business or occupation?

A. I am a certified public accountant.

Q. Are you licensed to practice as a certified public accountant in the State of California?

A. I am.

Q. How long have you been engaged in the practice as a certified public accountant in this state?

A. About 10 years.

Q. Are you licensed to practice before the Treasury Department of the United States?

A. I am.

Q. Are you a member of any professional societies or associations?

(Testimony of Ralph W. Kibbee.)

A. I am a member of the California State Society of Certified Public Accountants.

Q. As a certified public accountant, have you prepared income tax returns? A. I have.

Q. Have you prepared such returns on both a calendar and a fiscal year basis?

A. Yes.

Q. Have you prepared income tax returns on both cash and accrual basis? A. Yes.

Q. Have you, as a certified public accountant, verified and audited returns prepared by others?

A. Yes, I have.

Q. Mr. Kibbee, I place before you Exhibits 4, 5, 6, GG and HH. I will ask you to look at Exhibit 4, which is a photostatic copy of the original returns of the defendant Phillip Himmelfarb for the calendar year 1944. I will ask you if you have seen that exhibit prior to taking the stand in this case? [1206]

A. I have.

Q. I will ask you if you also saw a copy of Exhibit 6 prior to the time that you say Exhibit—I will withdraw that. I am referring to Exhibit 4.

A. I did see a copy of this before.

Q. I will ask you to look at Exhibit 6, which is a photostatic copy of the original joint venture return of the defendants Phillip Himmelfarb and Sam Ormont for the fiscal year May 1st, 1944 to April 30, 1945. I will ask you if you saw that exhibit prior to the time that you took the stand in this case? A. I did.

(Testimony of Ralph W. Kibbee.)

Q. I will ask you whether or not you saw a copy of this exhibit prior to the time you saw Exhibit 6?

A. I did.

Q. I will now direct your attention to the photostatic copy of the income tax return for the defendant Phillip Himmelfarb for the year 1945, which is Exhibit GG. I will ask you whether or not you saw a copy of that exhibit prior to the time you took the stand in this case?

A. I did.

The Court: And HH?

The Witness: Yes, sir, and HH.

Q. (By Mr. Katz): And 5?

A. And 5, yes, sir. [1207]

Q. Mr. Kibbee, have you computed the income tax for the 1944 return—that is Exhibit 4—based upon the income reported and the deductions taken in that return?

A. I have.

Q. Is the income tax as shown on that return, Exhibit 4, based upon the income reported and deductions taken in such return, true and correct?

A. It is.

Mr. Strong: I object to that, your Honor. It calls for a conclusion.

The Court: Yes. This is opinion evidence.

Mr. Strong: On a matter of law.

The Court: The same class of evidence that Mr. Eustice gave.

Mr. Strong: Your honor indicated the tax due was a matter of law.

The Court: His opinion on calculations are a matter of law. [1208]

(Testimony of Ralph W. Kibbee.)

Q. (By Mr. Katz): Have you computed the income tax on the 1945 return for the defendant Phillip Himmelfarb, which is Exhibit GG, based upon his income reported and deductions taken in such return? A. I have.

Q. Is the income tax shown on that return GG, as based upon the income therein shown and the deductions therein taken, true and correct?

A. It is.

Q. Is the amount that is shown on the joint venture return, Exhibit 6, reported as income in the 1945 returns filed for the defendant Phillip Himmelfarb and Ruth Himmelfarb, his wife?

A. It is.

Q. Have you recomputed the 1944 return of the defendant Phillip Himmelfarb by allocating a part of the income from the joint venture reported in the 1945 return, Exhibit GG, to the 1944 return, Exhibit 4? A. I have.

Q. Has the amount that you allocated to the 1944 return been added to the net income shown in the 1944 return as filed? A. I have.

Mr. Strong: Objected to, your Honor. It is indefinite and doesn't say what amount. I don't know what we are talking [1209] about here.

Mr. Katz: It is preliminary, that question, your Honor.

The Court: He is coming up to that. That is what he is getting at.

Mr. Strong: All right.

Mr. Katz: May I have the answer?

The Court: He has. This is on his calculation?

(Testimony of Ralph W. Kibbee.)

Mr. Katz: Yes, your Honor.

Q. What is the amount that you added to the 1944 return in such recomputation?

Mr. Strong: Objected to on the ground there is no proper foundation laid for his adding any amount. There is no showing what sums should or should not be taken, even on the basis of the defendant's story. If he just picks an *amount of thin air* it doesn't mean anything.

The Court: This is preliminary.

Mr. Strong: He is getting to the figures, now, your Honor.

The Court: I know he is getting to the figures, but obviously what he is doing is taking the calculations on the basis that Mr. Eustice allocated the return for that year.

Mr. Katz: Not precisely, your Honor.

Mr. Strong: That is the point.

Mr. Katz: The testimony will establish where he gets the figures. Eustice's testimony did not come in as against us and I am not using the figure that Mr. Eustice used and the [1210] testimony will establish where the figure came from.

The Court: This is all opinion evidence and it is a matter of calculations and all of these are hypotheses and sooner or later the jury are going to have to determine, in the event the case gets to them, whether or not the hypotheses are correct. That is to say, the assumption that such and such was his income or was not his income.

The question was, what was the figure?

The Witness: The figure was \$13,641.11.

Q. (By Mr. Katz): Where did you get that figure, Mr. Kibbee?

A. That figure was determined as being the addition to the income for the year 1944 for Count 2 of the indictment and the bill of particulars.

Q. How did you arrive at that amount that you have just stated, \$13,641.11 from Count 2 of the indictment and bill of particulars?

A. I arrived at that amount by subtracting from the total amount shown in the bill of particulars as belonging to the year 1944 a total of \$18,252.65, deducting from that amount the amount shown on the defendant's 1944 personal income tax return of \$4611.54, the difference being the amount that the Government has added to his net income.

Q. And is that amount that you arrived at by that computation the amount that is shown in the indictment as being [1211] the net income in Count 2 for the defendant Phillip Himmelfarb for the year 1944? A. It is.

Q. What is the total amount of the tax as recomputed by you and calculated on the basis of the net income as shown on the 1944 return, plus the additional amount of \$13,641.11?

A. That total tax is \$5843.91.

Q. Did you recompute the 1945 return filed by the defendant Phillip Himmelfarb on the basis of the net income as shown on that return, less the deduction of the amount of \$13,641.11 which you allocated to the year 1944? A. I did.

Q. What is the total amount of the tax as recom-

(Testimony of Ralph W. Kibbee.)

puted by you upon the basis of the net income as shown in the 1945 return, less the amount of \$13,641.11 as allocated to 1944?

A. A total tax is \$1881.85.

Q. What is the total amount of the tax for the years 1944 and 1945 as shown by the returns for these years as filed by the defendant Phillip Himmelfarb?

A. \$8891.97.

Q. What is the total amount of the tax for the years 1944 and 1945 as recomputed by you upon the addition of the \$13,641.11 to 1944 and the deduction of that amount from 1945?

A. The total recomputed tax is \$7725.78. [1212]

Q. Mr. Kibbee, what is the difference in dollars and cents between those two totals?

A. \$1166.19.

Q. With respect to the returns for the years 1944 and 1945, as filed, does that amount which you have just given as the difference, represent an overpayment or an underpayment by the defendant?

Mr. Strong: This is still opinion, your Honor?

The Court: This is still opinion, on the assumption that the calculations were according to this witness' calculations.

A. It represents an overpayment.

Q. (By Mr. Katz): Mr. Kibbee, following the same methods of valuation and calculation for Ruth Himmelfarb's returns, would the tax, as recomputed, be substantially the same as for the defendant Phillip Himmelfarb?

A. It would be substantially the same, except

(Testimony of Ralph W. Kibbee.)

for a minor differential represented by an additional exemption, or a one less exemption on the part of the wife.

Q. Would such recomputation for Ruth Himmelfarb, including the variation by reason of the exemption, result in an overpayment in the same manner as you testified in respect to the defendant Phillip Himmelfarb?

A. It would still result in an overpayment.

Q. How much would the total overpayment amount to for [1213] both the defendant Phillip Himmelfarb, and Ruth Himmelfarb, his wife?

A. Approximately double the \$1166.19, except for the minor variation.

The Court: Excuse me just a moment. I will have to take a short recess. You will remain in the box. [1214]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated, your Honor.

Mr. Robnett: Yes, your Honor.

The Court: Proceed.

Q. (By Mr. Katz): Mr. Kibbee, you have prepared a set of schedules showing the computations you have just testified to? A. Yes.

Q. And those are the schedules that I have presented to Court and counsel in this case?

A. Yes.

Q. Have you recomputed the returns for the calendar years 1944 and 1945 utilizing a figure as an addition to 1944 and a deduction from 1945

(Testimony of Ralph W. Kibbee.)

which is other and different from the amount used in the recomputation you have just testified to?

A. I have.

The Court: By the way, Mr. Eustice's calculations were marked for identification, weren't they?

Mr. Strong: Yes, your Honor.

The Court: These should be marked as well so that the record will know what we are talking about. This one you testified about a few moments ago will be KK and the one just handed to Court and counsel will be LL for identification. [1215]

(The documents referred to were marked Defendant's Exhibits KK and LL respectively for identification.)

Q. (By Mr. Katz): Mr. Kibbee, what figure did you use in the recomputation last mentioned?

A. I took the amount of the joint venture share of the profits, which was distributed to Phillip Himmelfarb and allocated that upon the basis of the number of days that the joint venture was in existence during the year 1945 and the number of days that the joint venture was in existence during the year 1944. Such fractional apportionment amounts to 245 days of the joint venture's fiscal year falling within the calendar year 1944 and 120 days of the joint venture's fiscal year falling in the calendar year 1945. The fractions therefore are $\frac{245}{365}$ falling in the calendar year 1944 and $\frac{120}{365}$ falling in the calendar year 1945.

(Testimony of Ralph W. Kibbee.)

Q. On the basis of the apportionment of the share of the joint venture reported by defendant Phillip Himmelfarb falling within the year 1944, being as you stated 245/365, what is the figure so arrived at? A. \$11,979.63.

The Court: That is 245/365 of the total reported, is that right?

The Witness: That is right, sir. [1216]

Q. And what is the total amount of the tax as recomputed by you, on the basis of the net income as shown in the 1944 return, plus the additional amount of \$11,979.63, which represents the fractional interest or share allocated to 1944?

A. That total tax is \$5005.59.

Q. What is the total amount of the tax as recomputed by you, on the basis of the net income as shown on the 1945 return, less the amount of \$11,979.63 allocated to the year 1944 as the fractional share falling within that year?

A. That tax amounts to \$2,454.39.

Q. What is the total amount of the tax for the years 1944 and 1945 as recomputed by you, on the basis of allocating the fractional shares for the year within which they fall?

A. The total recomputed tax for both years together would be \$7,459.98.

Q. What is the difference in dollars and cents between the total as so recomputed by you, the last recomputation you testified about, and the sum of \$8891.97, which you testified was the total tax for 1944 and 1945, as those returns were filed?

A. Such difference is \$1431.99.

(Testimony of Ralph W. Kibbee.)

Q. With respect to the returns for the years 1944 and 1945, as filed, does the difference of \$14,031.99—

A. Correction, please. \$1431.99.

Q. —\$1431.99 represent an overpayment or an under [1217] payment?

A. It represents an overpayment.

Q. Following the same method of computation and calculation for Ruth Himmelfarb's returns for the year 1944 and 1945, as you followed in the computation just testified to, would such recomputation be the same as for the defendant Phillip Himmelfarb's return?

A. It would be substantially the same except for the minor differential which arises by the fact that Ruth Himmelfarb has only one dependent as against Phillip Himmelfarb's two.

Q. Would such recomputation for Ruth Himmelfarb, on the basis just testified to, including the minor variations you have referred to, result in an overpayment by her in the same manner as it does in the recomputation made for the defendant Phillip Himmelfarb?

A. It would result in the same type of overpayment.

Q. How much would that total overpayment amount to for both defendant Phillip Himmelfarb and his wife, on the basis of the recomputation just testified to?

A. Substantially double the amount of \$1431.99, except for the minor variation.

(Testimony of Ralph W. Kibbee.)

Q. Did you have prepared a set of schedules showing the recomputation you just testified to?

A. I have. [1218]

Q. And those are the schedules which have been handed to counsel and the Court, marked Defendant's No. LL? A. Yes.

Q. Mr. Kibbee, at my request have you totaled these——

A. Just one minute, please, to compute this. If counsel please I would like to take out a few minutes to verify the year 1945. I can testify with relation to the year 1944.

Q. What do you require to complete your computation for the year 1945?

The Court: Computing what?

Mr. Katz: Computing the total of the checks.

The Court: Exhibit II?

Mr. Katz: Exhibits II and Exhibit JJ, if the Court please.

The Court: All together?

Mr. Katz: No, separately.

The Witness: II is complete, sir. JJ I still require a few moments on. [1219]

The Court: Go ahead and compute it.

The Witness (making calculation): I am ready.

Q. (By Mr. Katz): Mr. Kibbee, what is the total of the checks comprising Exhibit II for identification? A. \$631.20.

Q. Do the returns of Phillip Himmelfarb and Ruth Himmelfarb for the year 1944 show a tax withhold? A. It does; they both do.

(Testimony of Ralph W. Kibbee.)

Q. What is the total amount of the tax withhold shown on the two returns for 1944?

A. \$356 on one return and \$434.80 on the other return.

Q. Have you added the withhold of those two returns to the amount of \$631.20, which is the total of Exhibit II for identification? A. I have.

Q. What is the total result of adding the \$631.20 and the two withholds shown in the 1944 returns?

A. \$1422 even.

Q. I will ask you now to look at the tax returns for the year 1944 and state whether or not that amount of \$1422 is the total tax shown by those two returns. A. It is.

Mr. Katz: At this time, if the Court please, we offer into evidence the checks payable to the Collector of Internal [1220] Revenue marked for identification as II.

Mr. Strong: If counsel will state that these are the checks in payment of the tax I will accept his word for it. I don't want to waste time checking it.

Mr. Katz: Those were. I have been so advised.

Mr. Strong: Then I have no objection on that basis.

The Court: Admitted in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit II.)

Q. (By Mr. Katz): Mr. Kibbee, have you totaled the checks comprising Exhibits JJ for identification? A. I have.

(Testimony of Ralph W. Kibbee.)

Q. Will you state what the total amount is of the checks comprising Exhibits JJ?

A. \$14,406.94.

Q. Do the returns of the defendant Phillip Himmelfarb and his wife Ruth Himmelfarb show a withhold on the 1945 returns? A. They do.

Q. And what is the total amount of such withhold, or what are the separate amounts shown on each return?

A. The separate amounts are \$837.30 and \$837.29.

Q. Have you added the amount shown on the returns for the year 1945 as tax withheld to the total of the checks comprising [1221] Exhibit JJ for identification? A. I have.

Q. What is the total you arrived at by such addition? A. \$17,081.53.

Q. I will ask you to look at the total tax shown on the 1945 returns for the defendant Phillip Himmelfarb and his wife and state whether or not the amount of tax so shown is the amount you have just stated as the total of the checks plus withhold.

A. The amount of tax shown on the two returns totaled \$16,751.93, a difference of \$329.60 as against the amount of checks and withholding in Exhibit JJ. There is a mathematical error some place that cannot be seen for the moment. The payments total \$329.60 more than the amount of the tax as shown combined. [1222]

Mr. Katz: If the Court please, we offer in evidence Exhibit JJ for identification.

(Testimony of Ralph W. Kibbee.)

Mr. Strong: We object to that, your Honor. Of course, there is this error of \$300 and some odd dollars which has not been computed in the 1944 return. I don't know what it has to do with in this case, if anything. Possibly in payment of something else. We object upon the ground that no proper foundation has been laid for Exhibit JJ.

The Court: No proper foundation. Objection sustained.

Q. (By Mr. Katz): Mr. Kibbee, will you please take a look at the returns for the year 1945, and please state whether or not those returns have a stamp showing payment.

Mr. Strong: I will stipulate that they have, your Honor.

Mr. Katz: Is it stipulated that the payment of tax has been paid as shown on those returns?

The Court: If it is stamped as paid, it was paid.

The Court: I think that was the stipulation made previously in the trial.

Mr. Katz: Yes.

The Court: But that was not the basis of my sustaining the objection, because no foundation has been laid. This witness is purely an opinion witness. There is no foundation laid, because there is no testimony that these were actually used in payment of the tax. [1223]

Mr. Katz: Except, it was payable to the Collector of Internal Revenue, and I can't for the moment explain the overpayment. No further questions. Cross-examine.

(Testimony of Ralph W. Kibbee.)

Cross-Examination

By Mr. Strong:

Q. When were you first retained in connection with this case, Mr. Kibbee? A. Yesterday.

Q. That's the first time you had anything to do with these income tax returns, or the matters you have testified to? A. That is right.

Q. As I understand it, what you have testified to, all your calculations were based upon this document in evidence here, which is Government's Exhibit 4, is that right? That's Phillip Himmelfarb's 1944 return? A. That is right.

Q. Then you used Government's Exhibit 5, which is Ruth Himmelfarb's 1944 return?

A. That is right.

Q. Then you used Government's Exhibit 6, which is the fiscal year return for both Ormont and Himmelfarb? A. That is right.

Q. Then you also used this document which has been marked Defendant's Exhibit GG, which is the 1945 return for Phillip Himmelfarb? [1224]

A. That is right.

Q. Then you used this document marked HH, which is the 1945 return for Ruth Himmelfarb?

A. Right.

Q. Did you have any discussions regarding these matters with Mr. Phillip Himmelfarb, or Mrs. Ruth Himmelfarb? A. No.

(Testimony of Ralph W. Kibbee.)

Q. So you don't know of your own knowledge whether any of the figures or statements in these returns are true, or aren't true?

A. That is right.

Q. You just took them as they are shown, and you assumed they would be true, because they so reported?

A. That is right.

Q. Then you simply did a mathematical calculation, as you testified to?

A. That's right.

Q. Based upon these assumptions you have indicated?

A. Correct.

Q. You have, in your schedules, and in your testimony, assumed that if you took certain sums from the 1945 reported income, and added them to the 1944 income, you would get different results?

A. Right.

Q. You don't know, as a matter of fact, whether any of [1225] these sums came from one year or the other: you are just basing your answer on the returns themselves?

A. That is right.

Q. That is correct for the 345/365ths, which is the number of days; you just split up arbitrarily?

A. Not arbitrarily. That is an accepted matter of dividing the income, where the details are not known or when.

Q. You took 345 days, which was the 1944 portion you found, and you took that portion from the entire fiscal year return?

A. That is right.

Q. That, you say, is the accepted method?

A. Right.

(Testimony of Ralph W. Kibbee.)

Q. When you made all these computations, how much tax was overpaid and underpaid, and everything else, which you testified to, that all assumes certain matters are true? A. That is right.

Q. But you have no knowledge of that?

A. Correct.

Q. Let me ask you, if the sum of \$11,979.63, which you allocated to the year 1944 for Phillip Himmelfarb, as part of the joint venture sum of \$70,000 odd thousand dollars, if that was earned in 1944, and if that was added to the sum he reported of \$4611.54, then, isn't it true, if that was earned on a calendar year basis that should have been reported in his [1226] 1944 return, in the sum of \$16,091.17, shown on your schedule?

Mr. Katz: Objected to, if the Court please. That is now calling for a question of law which the Court must determine.

Mr. Strong: Same opinion that they have been asking him all morning, your Honor.

The Court: No, it isn't the same opinion they have been asking him all morning. It is so obvious I do not know why there should be any question about it. The objection is sustained.

Mr. Strong: You mean the answer is obvious, your Honor? It is obvious I won't ask any questions to get at it then.

The Court: The witness is offered solely as an expert witness on assuming certain hypotheses.

Q. (By Mr. Strong): Now this schedule which you prepared, as I understand it—I am not quite

(Testimony of Ralph W. Kibbee.)

clear on it—on the calculation of the 1944 share of the joint venture income you have only testified to the amounts that you have allocated to Phillip Himmelfarb and then you said that a similar amount would be allocated to Ruth Himmelfarb.

A. That is right.

The Court: I think I will overrule counsel's objection to the last question.

Mr. Strong: I will reframe it, your Honor.

Q. If I remember what I asked you before, if you added the sum of \$11,979.63, which on your document LL there you [1228] have allocated as earned in 1944, that is, Mr. Himmelfarb's share of the community income as I understand it, and if you added that to the amount that he reported for 1944, \$4611.54, then the amount—assuming that those sums were in 1944—then the amount for that year which should have been reported was \$16,591.17?

A. That is right.

Q. And the tax on that which should have been reported and paid, assuming those are the amounts he earned in that year, would have been——

A. That is on the next page.

Q. ——\$5005.59?

A. That is right.

Q. And then the same or almost the same amount would have been paid and reported by Mrs. Himmelfarb?

A. That is right.

Q. And the amount that Mrs. Himmelfarb should have reported was based upon the income of the joint venture which was earned by Phillip Himmelfarb?

A. That is right.

(Testimony of Ralph W. Kibbee.)

Q. And that was a total income for Phillip Himmelfarb split up on a community income basis?

A. That is right.

Q. And I assume that the same thing goes for the other figures which you have testified to here and you have split [1229] them up on that basis, half to Mrs. Himmelfarb and half to Mr. Himmelfarb?

A. That is correct.

Mr. Strong: That is all. Thank you.

The Court: Step down. This witness may be excused?

Mr. Strong: Yes, your Honor.

(Witness excused.)

The Court: Next witness.

Mr. Katz: If the Court please, at this time we will call Mr. Joe Abrams.

JOE ABRAMS

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Joe Abrams.

The Clerk: Your address?

The Witness: 1249 South Ogden.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Abrams, what is your business or occupation?

A. Salesman.

(Testimony of Joe Abrams.)

Q. Do you know the defendant Phillip Himmelfarb?
A. Yes, I do. [1230]

Q. How long have you known him?

A. About five years.

Q. Have you transacted business with him?

A. Yes, I have.

Q. Have you had business transactions with him which involve the payment of bills and indebtedness?
A. Yes, sir.

Q. Do you transact business with other persons who transact business with Mr. Himmelfarb?

A. Yes, sir.

Q. Do you know Mr. Himmelfarb's reputation for truth, honesty and integrity and the paying of his bills and meeting his obligations in the community in which he lives?
A. Yes, I do.

Q. What is that reputation, good or bad?

A. To my knowledge it has been good.

Mr. Katz: Cross-examine.

Mr. Strong: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Call Mr. Bedder.

PETE BEDDER

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified [1231] as follows:

The Clerk: Your name?

The Witness: Pete Bedder.

(Testimony of Pete Bedder.)

The Clerk: How do you spell it?

The Witness: B-e-d-d-e-r.

The Clerk: Your address?

The Witness: 6331 Lindenhurst Avenue.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Bedder, do you know the defendant Phillip Himmelfarb? A. Yes, I do.

Q. How long have you known him?

A. About three or four years.

Q. Have you transacted business with him?

A. I have.

Q. Did such transactions involve the payment of bill and indebtedness to you? A. Yes.

Q. Do you transact business with other persons who transact business with Mr. Himmelfarb?

A. Yes, I do.

Q. Do you know Mr. Himmelfarb's reputation for truth, honesty, integrity and the paying of his bills in the meeting [1232] of his obligations in the community in which he lives?

A. Yes.

Q. What is that reputation, good or bad?

A. Very good.

Mr. Katz: Cross-examine.

Cross-Examination

By Mr. Strong:

Q. What business are you in?

A. Life insurance business.

(Testimony of Pete Bedder.)

Mr. Strong: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Mr. Ray, please.

FREDERICK L. RAY

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Frederick L. Ray.

The Clerk: R-a-y?

The Witness: Yes.

The Clerk: Your address?

The Witness: 539 South Berendo.

The Clerk: Take the stand. [1233]

Direct Examination

By Mr. Katz:

Q. Mr. Ray, do you know the defendant Phillip Himmelfarb? A. I do.

Q. How long have you known him?

A. About five years.

Q. Have you transacted business with him?

A. Yes, sir.

Q. Have you transacted business with other persons who have transacted business with him?

A. I have.

Q. Did such transactions involve the payment of bills and indebtednesses? A. That is right.

(Testimony of Frederick L. Ray.)

Q. Do you know Mr. Himmelfarb's reputation for truth, honesty, integrity and the paying of his bills and the meeting of his obligations in the community in which he lives? A. Yes, sir.

Q. What is that reputation, good or bad?

A. Very good, sir.

Mr. Katz: Cross-examine.

Cross-Examination

By Mr. Strong:

Q. What business are you in? [1234]

A. Real estate broker.

Q. He always pays his bills on time?

A. As far as I know.

Q. He has money to pay bills?

A. That is right.

Mr. Strong: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Mr. Vincent.

LOUIS VINCENT

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Louis Vincent.

The Clerk: Your address?

(Testimony of Louis Vincent.)

The Witness: 6714 Denny, North Hollywood.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Vincent, do you know the defendant Phillip Himmelfarb? A. Yes, sir; I do.

Q. How long have you known him? [1235]

A. About 15 years.

Q. Do you know other persons that know Mr. Himmelfarb? You have mutual friends and acquaintances? A. Yes, sir.

Q. Do you know what his reputation is for truth, honesty and integrity? A. Very good.

Mr. Katz: No further questions.

Cross-Examination

By Mr. Strong:

Q. Mr. Vincent, where did you first know Mr. Himmelfarb? A. Cleveland, Ohio.

Q. When did he come here?

A. Well, he come here about—I couldn't just recall the exact year—about eight years ago or so.

Mr. Strong: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Mr. Chauncey Bowlus Chauncey.

CHAUNCY BOWLUS CHAUNCY

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows: [1236]

The Clerk: Your name?

The Witness: Chauncy Bowlus Chauncy.

The Clerk: How do you spell your middle name?

The Witness: B-o-w-l-u-s.

The Court: Your first name is the same as your last name?

The Witness: Yes, sir.

The Clerk: Your address?

The Witness: 124 North Parkwood Boulevard, Pasadena.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Chauncy, do you know the defendant Phillip Himmelfarb? A. I do.

Q. How long have you known him?

A. Between four and five years.

Q. Do you know other persons that know him?

A. Lots of them.

Q. Do you know what Mr. Himmelfarb's reputation for truth, honesty and integrity in the community in which he lives is?

A. Very excellent.

Mr. Katz: No further questions.

Mr. Strong: No questions. [1237]

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: The defendant Phillip Himmelfarb rests, if the Court please.

The Court: The defendant Himmelfarb rests.

Do you wish to make an opening statement now, Mr. Robnett?

Mr. Robnett: Yes, I would like to make one, your Honor.

The Court: Very well. [1238]

OPENING STATEMENT IN BEHALF OF DEFENDANT ORMONT

Mr. Robnett: May it please your Honor, Mr. Strong, and ladies and gentlemen of the jury, it is customary in the trial of an action for the attorney representing clients to make a statement to the jury of what they are going to prove. As his Honor told you, we have a right to make this at various stages of the proceedings. I reserved the right to make mine at this time, before starting any evidence on behalf of my client, Mr. Ormont.

The reason for that was that I did not know until the prosecution put in their case what we would be expected to meet, and therefore, I could not make any statement before that time.

It has developed already, through cross-examination of the prosecution's witnesses, most of the defense of my client. Therefore, the evidence that I shall now offer to you, and the proof I expect to put in, will be very brief. It will be largely this:

I expect to prove that Mr. Ormont at all times during the years involved here, that is, up until

1944, had, in addition to the moneys that he had in banks, in his various bank accounts—had various and considerable sums of cash that he kept otherwise than on deposit in the bank; that he had accumulated that cash over a course of a great many years, and that starting in, possibly the latter part of 1942, but anyway in 1943. [1239]

That he utilized most of that cash in the purchase of Government bonds, and the balance of what cash he had on hand he used in the purchase of bonds in the early part, or sometime in the year 1944. And I expect the proof to show you also that many of the exhibits that have already been offered and introduced by me in evidence here, which are checks principally, were used by Mr. Ormont in the purchase of bonds during that time, and that with those funds, and those funds only, which are claimed by the other side they could not find and explain, he paid for all bonds that he did buy, and that he has reported all of his income.

And on that showing I shall ask at your hands a verdict for the defendant.

At this time, if the Court please, there are, I believe, two exhibits that possibly did not get into the evidence, and I thought they were. One is FF.

Mr. Katz: If the Court please, may I ask the Court to excuse all the witnesses who have testified?

The Court: All the witnesses who have testified this morning may be excused.

Mr. Robnett: FF is now offered in evidence.

Mr. Strong: No proper foundation has been laid, your Honor.

Mr. Robnett: Counsel stipulated that I might use these [1240] copies in lieu of the originals, and has also stipulated that the tax shown on it has been paid.

Mr. Strong: That is true.

The Court: I think, in view of the stipulation that this is entitled to be admitted, and it is admitted. I don't know, thinking of further foundation—there isn't any testimony in the evidence that Dora Goldberg is the mother, or related to the defendant Ormont.

Mr. Robnett: There are witnesses who have testified——

Mr. Strong: We will stipulate that Dora Goldberg is the name of the defendant's mother.

The Court: Very well. It is admitted in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit FF.)

Mr. Robnett: And Exhibit I does not appear to have been admitted in evidence.

Mr. Strong: Those are the bank records.

The Court: Did you offer them?

Mr. Robnett: I offer them at this time.

The Court: Admitted.

Mr. Katz: May it be admitted, if the Court please, as against the defendant Sam Ormont only?

The Court: As against Sam Ormont?

Mr. Katz: I am sorry. They are going in on behalf of Sam Ormont, and not against the defendant Himmelfarb, and are [1241] not binding upon him in any way.

Mr. Strong: I may make a motion to apply later this evidence as against both defendants.

The Court: The evidence as now offered by Mr. Robnett is offered as to the defendant Sam Ormont only, and is not to be considered by the jury in any way in connection with the defendant Phillip Himmelfarb.

Mr. Katz: Thank you, your Honor.

(The document referred to was received in evidence as Defendant Sam Ormont's Exhibit I.)

Mr. Robnett: If your Honor is going to take a forenoon recess, I would prefer to wait until after that time to start my evidence. If you are not, I will start it now.

The Court: Maybe we had better have a short recess. Remember the admonition.

(Short recess.) [1242]

The Court: Usual stipulation?

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

Mr. Strong: So stipulated.

The Court: Call your witnesses:

Mr. Robnett: I will ask the defendant Sam Ormont to take the stand, please.

SAM ORMONT

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Sam Ormont.

The Clerk: Your address?

The Witness: 407 North Cornwell Street.

The Clerk: Los Angeles?

The Witness: Los Angeles.

The Clerk: Take the stand.

Mr. Katz: If the Court please, may we at the outset have the understanding that any testimony of this witness on his own behalf is not to be binding on the defendant Himmelfarb?

The Court: It will not be considered by the jury as to the defendant Himmelfarb.

Mr. Katz: Thank you, your Honor. [1243]

Direct Examination

By Mr. Robnett:

Q. Mr. Ormont, I am going to place before you Exhibit S, being the check in your favor by Acme Meat Company for \$1332.27, and Exhibit T, being a group of checks by you to various payees, and Exhibit W. Will you kindly examine Exhibit T, the checks therein. A. Yes.

Q. Mr. Ormont, what were those checks given by you to those payees for?

A. Those were for livestock purchases.

(Testimony of Sam Ormont.)

Q. Will you now examine Exhibit S, I believe it is, a check from the Acme Meat Company to you for \$1332.27 and tell the jury what that check was given to you for?

A. This check was a reimbursement to myself from the company for the livestock purchases on my personal account.

Q. Represented by Exhibit T? A. Yes.

Q. I will ask you now to examine Exhibit W, which is application for purchase of United States Government bonds, Defense Series G, in the amount of \$7000, in which you are named as the purchaser but which bonds were ordered to be made out to you, Sam Ormont, and mother, Dora Goldberg, and they are dated 1/9/1943. I ask you to state whether or not the moneys you received back from the Acme Meat Company in [1244] Exhibit S were used by you on account of the purchase of those \$7000 worth of bonds?

Mr. Strong: You Honor, I think it is a little bit leading. I would like to have the witness testify. I object on the ground that the questions are leading.

The Court: The question is leading. However, he is merely saving time, and instead of taking ten direct questions to get the answer you get to the same place by the one question. Objection overruled.

The Witness: No, this check was not used to purchase these bonds.

Q. (By Mr. Robnett): Was it used by you to purchase any bonds? A. Yes, it was.

(Testimony of Sam Ormont.)

Q. I will now show you Exhibit V, which is a check of the Acme Meat Company to you for \$5000, and ask you to kindly examine it. I will ask you to state what you used that check for.

A. I used this check for the purchase of bonds.

Q. I will now ask you examine Exhibit P——

The Court: What date is that?

Mr. Robnett: The \$5000 one is dated 1/9/1943.

The Court: Did you purchase bonds on or about that date?

The Witness: Yes, your Honor. [1245]

Q. (By Mr. Robnett): Was it used, Exhibit V, the \$5000 check, used by you in purchasing the \$7000 worth of bonds represented by Exhibit W?

A. Yes, it was.

The Court: When? What is the date of the check?

Mr. Robnett: The check is dated January 8, 1943, and the application is dated January 9, 1943.

Q. While on the subject of Exhibit W, Mr. Ormont, do you at this time remember what additional funds in addition to Exhibit V, the \$5000 check, were used by you in purchasing those \$7000 worth of bonds?

A. Well, I believe there was a series of additional checks that were used in this purchase of the \$7000 worth of bonds.

Q. When you say a series of checks, were they your personal checks or someone's else?

A. I believe they were company withdrawal checks and possibly personal checks too. [1246]

(Testimony of Sam Ormont.)

Q. I will now show you Exhibit Y, which contains, I believe, eight \$100 checks of the Acme Meat Company, made payable to you, dated commencing with November 20, 1942, and on along and ending with January 8, 1946, and ask you to examine those checks. Have you examined them? A. Yes.

Q. Can you state what those checks were used for by you?

A. They were used in the purchase of bonds.

Q. Referring then to the \$7000 purchase, do you know whether or not they were used in that purchase? Would you look at the purchase slip, please?

A. Yes, they were used on that purchase.

Q. I will also show you Exhibit 6, which is a check dated December 11, 1942, made payable to you, and signed by United Dressed Beef Company, for the sum of \$204.75, and ask you to examine that. What was that check used for?

A. That was used in the purchase of bonds.

Q. And referring to Exhibit W, do you know whether it was used on the purchase of this \$7000 worth of bonds? A. Yes.

Q. I now show you Exhibit Z, which is a check of your own, made payable to yourself, and endorsed in blank, for \$595.25, and I will ask you what that check was used for?

A. This check was used for the purchase of bonds. [1247]

Q. Referring to Exhibit W, I will ask you if you know whether or not it was used on the purchase of those \$7000 worth of bonds?

A. Yes, sir, it was.

(Testimony of Sam Ormont.)

Q. Referring now to Exhibit W, and Exhibits V, Y, X and Z, the last four of which you have said were used on the purchase of bonds represented in Exhibit W, and which are for the several amounts of \$5000, eight \$100 checks, the check for \$204.75; another check for \$595.25, making, I believe, a total of \$6600.00, I will ask you if you now can tell the jury how you paid the balance of the purchase price of Exhibit W, which was \$7000? It would be \$400.

A. There was \$400 in currency used in this transaction.

Q. Referring to Exhibit X, which is a check from the United Beef Company to you for \$204.75, what was that used in payment of, if anything.

A. That was used in payment of a loan that I had made to the United Dressed Beef Company; interest on the loan.

The Court: What is their name?

The Witness: Borne.

Q. (By Mr. Robnett): Mr. Ormont, I am now showing you Exhibit O, a check of the Acme Meat Company to you for \$206.11, the check being dated 5/11/1942, and I am showing you Exhibit P, being your [1249] personal check to an Arthur P-a-c-h-e-c-o, it looks like, for \$206.11, dated 5/11/1942. Will you examine those, please? Referring now to Exhibit P, being the check of yourself to Arthur P-a-c-h-e-c-o, for \$206.11? Will you kindly tell the Court and jury what that was given for?

(Testimony of Sam Ormont.)

A. This check, made out to Arthur Pacheco, on my personal checking account, was for the purchase of several calves. I don't recollect just how many; and it amounted to \$206.11. [1249]

Q. I will ask you now to examine Exhibit O and tell me what that check was given to you for by the Acme Meat Company.

A. This was to reimburse me for the amount of the purchase that I made from my personal account.

Q. That is represented by Exhibit P?

A. Yes.

Q. What did you do with the funds from the Exhibit O, the return to you of your money that you had previously advanced, in the sum of \$206.11?

A. I believe I deposited it in my personal account, if I am not mistaken.

Q. Do you know whether or not it was used by you either directly or through your personal account on the purchase of bonds?

A. Well, I don't believe that check was used in the purchase of bonds.

Q. I will now show you Exhibit R, being a check signed by you in favor of Security-First National Bank of Los Angeles for \$8147.73, and ask you to examine that—the date is 5/1/1943—have you examined that? A. Yes, I have.

Q. Will you state to the Court and jury what that check was used for?

A. This check was used for the purchase of bonds.

(Testimony of Sam Ormont.)

Q. Do you recall the total amount of bonds that you [1250] purchased at the time you gave the check?

A. I believe it was a \$10,000 transaction.

Q. I will now again show you Exhibit S, being the check of the Acme Meat Company to you for \$1332.27, and which you have heretofore said you did use in the purchase of bonds, and ask you whether or not that check, in connection with Exhibit R you have just testified concerning, was used in the purchase of the bonds you have just mentioned.

A. Yes, this check was used in the purchase of those bonds.

Mr. Strong: Which check was that?

Mr. Robnett: That was the Exhibit S, I believe.

Mr. Strong: Thank you.

Mr. Robnett: As I calculate those two checks would amount to \$5480.

Mr. Strong: Is this a matter of opinion, your Honor?

The Court: He is getting ready to ask another question, I suppose.

Mr. Robnett: Yes, your Honor.

Q. —leaving \$520 balance to be paid on those bonds, if I am correct in my figures, and I will ask you, Mr. Ormont, if you can tell the jury what additional money or funds you used to make up that \$520 on the purchase of those \$10,000 worth of bonds.

A. I believe there was a \$50 bond interest check that [1251] was used, there was a \$20 item—I don't

(Testimony of Sam Ormont.)

know whether it was a money order or something of that type—and I believe \$450 in currency.

Mr. Robnett: I will ask to have this marked for identification, please.

The Clerk: MM.

(The document referred to was marked Defendant's Exhibit MM for identification.)

The Court: What was the date of that last transaction you were discussing?

Mr. Robnett: I think I can give it to you, your Honor.

The Court: Just the approximate date.

The Witness: About May 1st.

The Court: 1943?

The Witness: 1943.

The Court: All right.

Mr. Robnett: Did you get the information you wished?

The Court: Yes, thank you.

Q. (By Mr. Robnett): I now show you Exhibit MM for identification and ask you to examine that, it being a check of your own made payable to Benjamin Kosdon, dated February 1, 1943, for \$750. Have you examined it? A. Yes, I have.

Q. What was that check given for? [1252]

A. That was a loan to Mr. Kosdon.

Q. And did Mr. Kosdon repay that loan?

A. Yes, he did.

Q. When? A. About two months later.

Q. Do you remember in what manner he repaid it?

(Testimony of Sam Ormont.)

A. He gave me three Government checks, Government issue—I don't know exactly what they were—they were three Government checks amounting to approximately \$750 and some change.

Q. Some cents?

A. I believe it was about 76 cents, if I am not mistaken.

Q. \$750.76? A. Yes.

Q. According to your best recollection?

A. Yes.

Q. And what did you do with those Government checks?

A. I used those to purchase a bond.

Q. I show you Exhibit CC in this case——

By the way, I offer in evidence Exhibit MM, if the Court please.

Mr. Strong: I think it is irrelevant and immaterial, no connection shown as being within the issue of this case, having nothing to do with it.

The Court: Objection overruled.

(The document referred to was received in evidence and marked Defendant's Exhibit MM.)

Q. (By Mr. Robnett): Now showing you Exhibit CC, a check of your own dated April 3, 1943, payable to the Treasurer of the United States for \$249.26, I will ask you what you used that check for.

A. I used this check for the purchase of a bond.

Q. State whether or not that check, together with the Government checks you have just said that you received from Mr. Kosdon, were used together in the purchase of bonds.

(Testimony of Sam Ormont.)

A. Yes, they were used to buy a \$1000 G bond.

Mr. Robnett: I would like to have these checks marked for identification. I believe they can be marked as one.

The Clerk: NN.

(The documents referred to were marked Defendant's Exhibit NN for identification.)

Q. (By Mr. Robnett): Now, showing you Exhibit NN, containing a check dated November 30, 1942, made payable to yourself, for \$10,000, signed United Beef Company, by Sam Borne; and a check dated February 2, 1943, made payable to you for \$6000 signed United Beef Company by Sam Borne, I will ask you to examine that exhibit, and those checks. For what purpose were those checks given to you?

A. They were in repayment of a loan.

Q. How much was the original loan?

A. The original loan was \$6000.

Q. I mean the total loan, I should say.

A. The two checks?

Q. The total loan that they repaid.

A. \$16000.

Q. Mr. Ormont, were the funds that you received on those two checks, Exhibit NN, the first check, that is, the earliest dated check, being \$10,000, and the latter check being for \$6000—were those funds, or any part of them, used by you in the purchase of bonds? [1255]

A. Yes, they were.

(Testimony of Sam Ormont.)

Mr. Robnett: I offer these checks NN in evidence.

Mr. Strong: Objected to upon the ground that they are incompetent, irrelevant and immaterial, and not shown to be within the issues in this case.

The Court: Objection overruled. They are admitted in evidence.

(The documents referred to were received in evidence and marked Defendant's Exhibit NN.)

Mr. Robnett: I show these to counsel. I would like to have these three checks marked as our next exhibit.

The Clerk: OO.

(The documents referred to were marked Defendant's Exhibit OO for identification.)

Q. (By Mr. Robnett): I now show you Exhibit OO, consisting of a check dated March 11, 1941, made payable to F. Salter, for \$200, the check being signed by you, and endorsed F. Salter; the next check being dated March 22, 1941, payable to F. Salter, a \$7000 check, signed by you, and endorsed F. Salter; the next check being dated March 8, 1941, in your favor, for \$100, made out by Acme Meat Company, and endorsed S. Ormont, and underneath F. Salter, and ask you to examine those checks. Have you examined them?

A. Yes. [1256]

(Testimony of Sam Ormont.)

Q. What were those checks given by you for, the first two being made payable to Mr. Salter? What were they given for?

A. For a loan.

Q. The third one, being Acme Meat, payable to you, to whom did you give that?

A. To Mr. Salter.

Q. Are those three checks all on a loan or loans?

A. Yes, all of these comprised a loan.

Q. Constituting a total of \$1000? A. Yes.

Q. Was that loan ever repaid to you?

A. It was.

Q. In what year? A. In the year 1942.

Q. In what form was it repaid, if you recall, whether it was in cash or in checks?

A. A combination of two checks and currency.

Q. Do you remember the division, as to how much were in checks and how much currency?

A. A very small percentage in checks, and the balance, the bulk of it in currency.

Mr. Robnett: I offer Exhibit OO in evidence.

Mr. Strong: Same objection, your Honor.

The Court: Objection overruled. [1257]

(The documents referred to were received in evidence and marked Defendant's Exhibit OO.)

Q. (By Mr. Robnett): I now show you Exhibit AA, consisting of a check of the Acme Meat Company to you for \$100, dated January 22, 1943, and a similar check from the Acme Meat Company to

(Testimony of Sam Ormont.)

you for \$100 dated January 29, 1943, and ask you to examine them, please. What were those checks given to you for?

A. They were a withdrawal from the Acme Meat Company. [1258]

Q. What did you use them for, if you recall?

A. I used those in the purchase of a bond.

Q. Did you use any additional funds in the purchase of that bond? A. Yes, I did.

Q. And can you tell us at this time what you used? A. I used \$550 currency.

Q. The cost of the bond was \$750?

A. A Series E bond; yes.

The Court: That was in 1943?

The Witness: Yes, your Honor.

Q. (By Mr. Robnett): Mr. Ormont, I will ask you to state whether or not at or near the end of the year 1941 you had any cash or currency belonging to you that was not on deposit in any bank.

A. Yes.

Q. Will you state to the Court and the jury approximately how much money in cash or currency you so had? A. About \$11,000 or \$12,000.

Q. What if anything did you do with that currency or cash thereafter? That would be after 1941.

A. The bulk of it was used to purchase bonds.

Q. In what year did you use the most of it for purchasing bonds? A. In 1943. [1259]

Q. At this time do you know definitely how much of that was used for that in that year 1943?

A. Between \$8000 and \$9000.

(Testimony of Sam Ormont.)

Q. And the balance of it, what was that used for? A. In the purchase of bonds.

Q. In what year? A. In 1944.

Q. Now, Mr. Ormont, were you ever acquainted with a man by the name of Kane? A. Yes.

Q. Did you ever have any business transactions with him along about 1942?

A. Well it goes a little earlier than that.

Q. I will ask you this, did you ever loan him any money? A. Yes, I did.

Q. How much money did you loan him?

A. \$500.

Q. When did you loan him that?

A. Sometime in 1938, I believe.

Q. Did he ever repay it? A. Yes, he did.

Q. What year did he repay it?

A. In 1942.

Q. In what manner did he repay it, that is, what form [1260] did the payment take, was it checks or currency or what? A. In currency.

Q. What did you do with the \$500 that he repaid?

A. I think I deposited it in my personal account.

The Court: Had you made any practice before 1941 to carry large sums of currency?

The Witness: About my person?

The Court: Yes.

The Witness: I didn't carry large quantities with me, your Honor.

The Court: Had you made it a practice to have either currency on your person or currency available other than banks?

(Testimony of Sam Ormont.)

The Witness: No, I didn't carry it about my person.

The Court: Or available to you other than banks?

The Witness: Oh, yes; it was available to me at any time.

The Court: How long had you had that practice?

The Witness: It has been a practice for a great many years.

Q. (By Mr. Robnett): Could you give the Court and jury an idea about how long you had had the practice of keeping some of your funds in that form as currency or cash?

A. From back in 1928.

Q. 1928? [1261] A. Yes, sir.

Q. And throughout the years up until about '42, did you continue to put some of your money or keep some of your money in that form? A. Yes.

Q. The money that you had testified to, the amount that you finally had in 1941, state whether or not that was an accumulation of the funds you had so kept and saved during those years from 1928.

A. I didn't get that question completely, please.

Mr. Robnett: Read the question, Mr. Reporter.

(The question referred to was read by the reporter as set forth above.)

The Witness: Yes, it was.

The Court: How long were you in the business?

The Witness: I started in the early part of '28.

The Court: In the early part of 1928?

The Witness: Yes.

(Testimony of Sam Ormont.)

The Court: Do you recall, for instance, how much currency you had on hand when the banks were closed in 1933?

The Witness: Well, I can't estimate it exactly, your Honor. I presume around——

The Court: Your best recollection.

The Witness: Between \$4000 and \$5000.

The Court: Did you use that in your business during [1262] that period?

The Witness: No, I didn't.

The Court: You did not?

The Witness: No, I did not.

Q. (By Mr. Robnett): I will ask you, you started in business, did you not, that is, in the slaughtering business or meat business—I don't know which it was—about 1928 with Mr. Salter?

A. Yes.

Q. Prior to that time had you been employed in any gainful occupation? A. Yes, I had.

Q. And from that employment had you any funds when you went into business that was not in the form of currency?

A. I believe I had.

The Court: What was your occupation?

The Witness: I was a driver for a meat company.

The Court: A driver for a meat company?

The Witness: Yes.

Q. (By Mr. Robnett): And at a time prior to that occupation, what had you been doing?

A. I had worked for the Southern California Telephone Company. [1263]

(Testimony of Sam Ormont.)

The Court: I want to ask a question. You may wish to object to it. I won't wish to be offensive, Mr. Ormont, but where were you born?

The Witness: Saint Johnsbury, Vermont.

The Court: Saint Johnsbury, Vermont?

The Witness: Yes, your Honor.

The Court: You came here when?

The Witness: When I was about nine months old.

The Court: With your parents?

The Witness: With my parents, yes, your Honor.

Q. (By Mr. Robnett): Mr. Ormont, as to your habit of keeping some of your funds in currency, would you state to the Court and jury what your reason was for so doing?

A. Well, when I first started my mother had a very unfortunate experience in her early days in Los Angeles. She lost quite a bit of her savings in a couple of small bank failures, and she always advised me never to keep all of my eggs in one basket.

Q. That was the reason you did that?

A. Yes.

Q. And you continued to do that until you finally invested these funds in these bonds, is that correct?

A. Correct.

Mr. Robnett: You may cross-examine. [1264]

Cross-Examination

By Mr. Strong:

Q. What were the banks that failed, Mr. Ormont?

(Testimony of Sam Ormont.)

A. There was a Japanese bank my mother had in funds, and I don't recollect the other one. It was one of the banks in our neighborhood, we were living in at the time.

Q. You don't remember the name?

A. No, I don't.

Q. And I assume that this cash which you talk about was accumulated from your earnings when you were with the Acme Meat Company, with Mr. Salter, that is, from earnings in the Acme Meat Company?

A. Some of it.

Q. You had living expenses? A. Yes.

Q. Do you occupy a house? A. Yes.

Q. How big is the house?

A. A six-room house.

Q. How long have you had it?

A. I haven't had it.

Q. Whose is it? A. It is my mother's.

Q. Have you contributed toward the expense of your mother during the last two or three years?

Mr. Robnett: Objected to as not cross-examination.

The Court: No, that is not.

Mr. Strong: Can I make it part of my direct of this witness, at this time?

The Court: You can't call this witness as your witness.

Mr. Strong: I can't make him my witness for the purpose of the question, your Honor?

The Court: I am afraid you can't, counsel. After all, you are representing the Government.

(Testimony of Sam Ormont.)

This is a defendant. And a witness cannot be compelled to testify against himself. You may cross-examine him on questions counsel opened. Under no circumstances can you call him as your witness.

Mr. Strong: Do I understand I am limited to just cross-examination?

The Court: That is correct, of any defendant.

Q. (By Mr. Strong): Mr. Ormont, as to Exhibit NN, the two checks, one for \$10,000, and one for \$6,000, I understand you said you bought bonds with the proceeds of those checks?

A. They ultimately went into bonds.

Q. You say this was a repayment of a loan?

A. Yes.

Q. And when the money which you loaned was originally earned, I assume that was entered by you as part of the income for that year? [1266]

Mr. Robnett: Objected to as not cross-examination; incompetent, irrelevant and immaterial.

Mr. Strong: Those checks that he talked about, your Honor.

The Court: No, you are coming back to the year now, when he allegedly earned that money. That was your question, whether or not it was earned before that year. That is incompetent, irrelevant and immaterial.

Mr. Strong: I am testing his credibility as to what this money was, and where it went.

The Court: I understood your question was as to the year he earned that money, and whether he reported it as income.

Mr. Strong: Yes.

(Testimony of Sam Ormont.)

The Court: Objection sustained.

Q. (By Mr. Strong): Do you know which bonds you bought with the checks represented by NN?

A. No, these particular items I wouldn't identify.

Q. The checks OO, I understood those two checks to Mr. Salter were in repayment of a loan, and the other check. What did you say was done with the proceeds from all those three?

A. Will you restate the question?

Q. What was done with the proceeds?

The Witness: I mean the first part.

Mr. Strong: I have changed it. Strike my question. [1267]

The Court: His testimony was that they were a loan.

Q. (By Mr. Strong): They were a loan?

A. Yes.

Q. Did you use those to buy bonds?

Mr. Robnett: I object to that upon the ground that it is incompetent, irrelevant and immaterial, and it shows on its face they were made to Mr. Salter. He could not have used them.

The Court: Objection overruled.

The Witness: State it again.

Q. (By Mr. Strong): I want to know whether you bought bonds with this money?

A. No, I don't believe I did.

Q. When was the loan made by Mr. Salter to you with which this was a repayment?

(Testimony of Sam Ormont.)

The Court: That was not his testimony. His testimony was that he loaned that money to Mr. Salter.

Q. (By Mr. Strong): Was that loan repaid?

A. Yes, it was.

Q. When was that?

A. It was repaid in 1942.

Q. It was entered on your books, I assume?

A. There were no books on that.

Q. No books on that loan? A. No.

Q. This check MM, Benjamin Kosdon, \$750, which says: Payment of loan of 3040 Sunset Boulevard,—did you record the receipt of the loan on your books?

A. There were no books on that either.

The Court: Was that a personal loan?

The Witness: Yes.

The Court: For the Acme Meat Company?

The Witness: No, it was out of my personal funds, your Honor.

Q. (By Mr. Strong): You mean the repayment was out of your personal funds?

A. No, the issuance of it was to Mr. Kosdon out of my personal funds.

Q. This check——

Mr. Robnett: Will you speak louder?

Mr. Strong: I will be glad to.

Q. This transaction of \$6,000 and \$10,000—\$16,000, which is Exhibit NN, was that recorded on your books as a loan?

A. No, that was not recorded on the books.

(Testimony of Sam Ormont.)

The Court: Was that a loan from you personally, or from [1269] the Acme Meat Company?

The Witness: It was from myself personally.

The Court: We will recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.)

Los Angeles, California, June 11, 1947

2:00 o'Clock P. M.

The Court: Usual stipulation?

Mr. Strong: Yes, sir.

Mr. Robnett: Usual stipulation.

Mr. Katz: Usual stipulation.

The Court: Mr. Ormont was on the stand.

SAM ORMONT

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Strong:

Q. Now as to Defendant's Exhibit MM, which is a check to Benjamin Kosdon for \$750 which you testified was from your personal account, do you know where that particular \$750 came from?

A. From my personal checking account.

(Testimony of Sam Ormont.)

Q. But you don't know where that sum itself originally came from into your account, do you?

A. From the account only, is all I know.

Q. In other words, you can't trace it further than the account? A. No.

Q. Now as to Defendant's Exhibit O, which is a check for \$206.11, that is a check from the Acme Meat Company [1274] account, is that right?

A. Yes, it is.

Q. And it is payable to you personally?

A. Correct.

Q. And you were the one who was the Acme Meat Company at that time?

A. What do you mean?

Q. I mean the Acme Meat Company was the name under which you were operating.

A. Not as a sole owner.

Q. You and Mr. Salter? A. Correct.

Q. Do you know what was done with that check of \$206.11?

A. I believe it was deposited.

Q. To your personal account?

A. To one of the personal accounts?

Q. You don't know the source of that money, the \$206.11, other than it came from the Acme Meat Company account?

A. That is correct.

Q. As to Defendant's Exhibit T, which was a series of checks which I understood you testified was used to pay for livestock purchases?

A. Yes.

(Testimony of Sam Ormont.)

Q. You didn't buy any bonds with any of these funds represented by those checks, did you?

A. Not by [1275] those checks; no.

Q. As to Defendant's Exhibit R, which is a check for \$8147.73, did I understand that that was used to purchase bonds?

A. Yes, it was.

Q. Which bonds?

A. This was the \$10,000 series.

Q. Do you know which particular bond it was?

A. It was several \$1000 bonds.

Q. And that money came from your personal account?

A. Yes.

Q. Do you know where its origin was originally before it got into your personal account?

A. All I know is that it came from the personal checking account.

Q. Your checking account?

A. Yes.

Q. But you can't say where that \$8147.73 came from?

A. From my personal checking account.

Q. But to get into it, can you say where it came from?

A. I don't recollect.

Q. As to this check which is Defendant's Exhibit S, which is drawn on the Acme Meat Company account signed by you, payable to you, that is for \$1332.27, that was used to buy a [1276] bond, is that right?

A. That was used in the purchase of bonds; yes.

Q. Which bonds?

A. The \$10,000 item.

Q. Still the \$10,000 item?

A. Yes.

Q. Can you designate with any more specificity which of those bonds it was?

(Testimony of Sam Ormont.)

A. I can't recollect the serial numbers; no.

Q. Do you know where this money came from originally before it got into the Acme Meat Company account?

A. No, I wouldn't know.

Q. This Defendant's Exhibit Z, which is a check for \$595.25, which is drawn by you on your personal account and payable to you, I understand that you bought bonds with that too.

A. Yes, I did.

Q. Which ones?

A. That was the \$7000 transaction.

Q. Where did that \$595.25 come from originally?

A. From my personal checking account.

Q. But before it got into there, do you know where it came from?

A. I don't know.

Q. In fact, wouldn't that be your answer to all of [1277] these checks?

A. Well, some particular ones I could identify but not these particular ones.

Q. How about this Defendant's Exhibit AA, which are checks drawn on the Acme Meat Company account signed by you and payable to you, each for \$100, was that used to buy bonds?

A. Yes.

Q. You wouldn't know as to where the money originally came from?

A. These moneys came from the Acme Meat Company.

Q. But the source from which the Acme Meat Company got them, would you know that?

A. No, I wouldn't.

(Testimony of Sam Ormont.)

Q. Now, you have been shown various checks here by Mr. Robnett which you testified to were used to purchase bonds. Were there any other checks used by you to purchase bonds which were not shown to you by Mr. Robnett?

Mr. Robnett: Object to that as not cross-examination.

The Court: Objection sustained. [1278]

Q. Defendant's Exhibit V, which is the check for \$5000, drawn on the Acme Meat Company account, signed by you, payable to you, which I understood by you to purchase bonds or a bond?

A. Yes.

Q. Can you state where that money originally came from before it got into the Acme Meat Company account?

A. I wouldn't know.

Q. And the \$204.75, which is the check by the United Dressed Beef Company, payable to you, was that used to buy a bond? A. Yes, it was.

Q. Which bond?

A. That was in the \$7,000 transaction.

Q. Without going into all the other checks, I want to ask you this: You testified that you kept a large amount of cash on hand, because you did not want to put it into banks, is that right?

A. I would not say that.

Q. Well, you were asked by Mr. Robnett:

"Q. Mr. Ormont, as to your habit of keeping some of your funds in currency, will you state to the Court and jury what your reason was for so doing?

(Testimony of Sam Ormont.)

Your answer was:

“A. Well, when I first started, my mother had a [1279] very unfortunate experience in her early days in Los Angeles. She lost quite a bit of her savings in a couple of small bank failures, and she always advised me never to keep all my eggs in one basket.”

That was the reason you gave then?

A. Yes. Did you say all of the funds originally in the question?

Q. That's right.

A. That is incorrect.

Q. Isn't true that you made very substantial deposits in your personal bank account during the years 1937, 1938, 1939, 1940, 1941 and 1942?

Mr. Robnett: I object to that as not cross-examination.

The Court: Overruled.

A. Yes.

Q. (By Mr. Strong): And you testified about how much money you had; as I understood, it was between eleven and twelve thousand dollars in cash which you had at the end of 1941. Can you state approximately when you accumulated that money?

A. In how many years' time?

Q. Yes.

A. I would say it was close to 14 years.

Q. Let us take the year 1941. How much would you say you accumulated out of that \$12,000 during 1941? [1280]

(Testimony of Sam Ormont.)

A. I would not know definitely.

Q. Roughly? A. I couldn't say.

Q. Not even by thousands or hundreds?

A. No.

Q. Can you say as to any one of the preceding years?

A. I would say it amounted from \$700 to \$1,000 a year.

Q. That was from your earnings?

A. That was from my earnings.

Q. And the balance of your earnings you deposited to your personal account?

A. Not necessarily.

Q. Would you deposit any of the balance of your earnings to your personal account?

A. Yes, some of them.

Q. How much would you say your income was in 1941?

Mr. *Ormont*: I object to that as not cross-examination.

The Court: Overruled.

A. I couldn't tell you exactly, without looking at the returns.

Mr. Strong: May I have this marked for identification, your Honor?

The Court: 57.

(The document referred to was marked Government's Exhibit 57 for identification.)

Q. (By Mr. Strong): Would [1281] your answer be the same as to 1940, 1939, 1938 and 1937?

(Testimony of Sam Ormont.)

Mr. Robnett: Same objection, your Honor please; not cross-examination.

The Court: This is admissible only for testing the credibility of the witness in connection with the one phase of his direct examination as to the amount of cash he had on hand.

Mr. Strong: That is what I am doing.

The Court: And for no other purpose?

Mr. Strong: Yes.

The Clerk: Exhibits 57 to 61, inclusive, marked for identification.

(The documents referred to were marked Government's Exhibits 58, 59, 60, 61, for identification.)

(Showing same to counsel.)

Mr. Strong: May we have permission to substitute photostats for these as soon as possible, as they are the original records of the Internal Revenue?

The Court: Surely, provided they are the same size as the originals, and not reduced; not so small you can't read them.

Mr. Strong: Black and white?

The Court: Black and white. [1282]

Q. (By Mr. Strong): These sums from \$700 to \$1,000, which you said you accumulated during 1941, and during each of the preceding years, they came from your earnings, is that correct?

A. Correct.

(Testimony of Sam Ormont.)

Q. Did you have any other source of income?

A. Not from my earnings; outside of my earnings.

Q. That money that you accumulated in cash was from your earnings, is that right?

A. Correct?

Q. I understand that amount of money that you said you accumulated in cash each of the years—

A. Was from earnings.

Q. Your earnings? A. Yes.

Q. You had no other source of income during those years? A. No.

Q. I show you Government's Exhibit 57 for identification, which is an income tax return, and simply ask you to refresh your recollection as to what your income was for the year 1941.

Mr. Robnett: Same objection.

The Court: Same ruling. Objection overruled.

The Witness: What is it you want?

Q. (By Mr. Strong): What was your income for that year? A. \$9068.25.

Q. I show you Government's Exhibit 61 for identification, which, I believe, is the original of your income tax return for the year 1940. Will you use that to refresh your recollection, and then state how much your income was during the year 1940?

A. \$7,499.49. [1284]

Q. Then I show you Government's Exhibit No. 60 for identification, which I believe is your original income tax return for the year 1939, and would you

(Testimony of Sam Ormont.)

refresh your recollection from that and state how much your income was during 1939?

A. \$9111.96.

Q. I show you Government's Exhibit 59 for identification and ask you to please state from that, which I believe is your original income tax return for the year 1938, how much your income during the year 1938 was.

A. \$6344.50.

Q. And finally I show you Government's Exhibit 58 for identification, which I believe is your income tax return for the year 1937, and will you refresh your recollection as to how much your income was for that year?

A. \$7381.33.

Q. Thank you. And it is from that income that you testified, I believe, that you took out the cash amounts, is that right?

A. Not all of it from those particular years.

Q. Well, you said from \$700 to \$1000 a year.

A. In those particular years you are talking about, yes.

Q. Now I ask you whether it isn't true that in the year 1942 you deposited to your personal account a sum in excess of \$24,000. [1285]

A. I beg your pardon?

Mr. Robnett: Object to that as not proper cross-examination.

Mr. Strong: He bought his bonds in '42 and '43.

The Court: Let me hear the question.

(The question referred to was read by the reporter as follows:

(Testimony of Sam Ormont.)

(“Q. Now I ask you whether it isn’t true that in the year 1942 you deposited to your personal account a sum in excess of \$24,000.”)

The Court: Objection sustained.

Mr. Strong: Is that as to the year?

The Court: Objection sustained.

Mr. Strong: Then I will have to ask other questions.

Q. I ask you whether it isn’t true that during the year 1941 you deposited to your personal accounts a sum in excess of \$21,000.

Mr. Robnett: Object to that as not proper cross-examination.

The Court: Objection sustained. The subject matter was not touched by the direct examination.

Mr. Strong: It goes to the credibility of the witness. The witness testified he saved cash and I think I can show to the contrary.

The Court: Objection sustained. [1286]

Mr. Strong: As to all the years I will ask, I assume?

The Court: As to the subject matter. The subject matter was not covered so if you ask the same question as to each year it would be sustained if the same objection were made.

Mr. Robnett: I assign counsel’s statement as prejudicial, your Honor.

The Court: The statement as to what he wanted to show?

Mr. Robnett: Yes.

(Testimony of Sam Ormont.)

The Court: The jury will be instructed to disregard the remarks of counsel.

Mr. Strong: No further questions.

The Court: Redirect?

Mr. Robnett: No redirect.

The Court: Cross-examination, Mr. Katz?

Mr. Katz: No questions, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Robnett: Mr. Paul Kane, please.

PAUL KANE

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name? [1287]

The Witness: Paul Kane.

The Clerk: Your address?

The Witness: 1417 South Crescent Heights Boulevard.

The Clerk: Beverly Hills?

The Witness: No, Los Angeles.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Kane, are you acquainted with Sam Ormont, the defendant in this action, who was just on the witness stand? A. I am.

(Testimony of Paul Kane.)

Q. And were you so acquainted with him in the year 1937? A. I was, sir.

Q. I will ask you if you had any transaction with Mr. Ormont during the year 1937.

A. I did.

Q. With regard to borrowing of money from him? A. Yes, sir.

Q. Did you or did you not borrow any money from Mr. Ormont that year? A. I did, sir.

Q. How much did you borrow? A. \$500.

Q. I will ask you if you have repaid that money.

A. I have, sir.

Q. What year did you repay it? A. '42.

Q. 1942? A. Yes, sir.

Q. In what manner did you repay it, that is to say, did you use checks or currency?

A. No, I paid him in cash.

Q. In cash? A. Yes.

Q. And did you make it all in one payment or in installments? A. In installments.

Q. How much? A. \$50 a month.

Mr. Robnett: Cross-examine.

Cross-Examination

By Mr. Strong:

Q. I ask you, Mr. Kane, whether you know how, if at all, that sum of money which you repaid was entered on the books of the Acme Meat Company.

A. I really couldn't tell you.

Mr. Robnett: Object to that as improper cross-examination, asking for an opinion of the witness.

The Court: Objection sustained. [1289]

(Testimony of Paul Kane.)

Q. (By Mr. Strong): I ask you to look at Government's Exhibit 1, which is an income tax return of the defendant Sam Ormont for 1942, and state whether you find any place upon that reported the sum of \$500 which you said you repaid during that year.

Mr. Robnett: I object to that as not cross-examination.

The Court: Objection sustained.

Mr. Strong: I will make him my direct witness, your Honor.

The Court: You cannot do it now. You have closed your case.

Mr. Strong: With reference to cross-examination, I may not?

The Court: No.

Mr. Strong: No further questions.

The Court: You can do it if you want to on rebuttal but not at this stage of the proceedings.

Mr. Strong: No further questions.

Mr. Robnett: That is all. And the witness may be excused.

Mr. Strong: I would like to have him remain, your Honor.

The Witness: I have to go back.

The Court: He says he has to go to work.

The Witness: I have a place of business and I had to leave somebody to watch it. [1290]

Mr. Strong: May I ask him out of turn then?

The Court: No, I do not think so.

(Testimony of Paul Kane.)

Mr. Strong: I will arrange to call him by phone if I may have his telephone number so as to not inconvenience him.

The Court: Will you give Mr. Strong your telephone number?

Mr. Strong: How long will it take you to get back?

The Witness: I can't answer that.

The Court: You got here this time.

The Witness: I can close the doors.

The Court: The order of court will be that either you remain until Mr. Strong calls you or that you return upon call.

The Witness: I better remain because I have someone there now, sir.

Mr. Robnett: He says he will remain.

The Court: You may have to remain all day today and tomorrow. I don't know when the defendants will finish their case.

Mr. Strong: I will take a chance and let him go back to his business and then I will try to get him myself.

The Court: Very well.

(Witness excused.)

The Court: Next witness.

Mr. Robnett: Mrs. Mary Reardon. [1291]

MRS. MARY REARDON

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Mrs. Mary Reardon; R-e-a-r-d-o-n.

The Clerk: Your address?

The Witness: 758 South Ardmore.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mrs. Reardon, in order that all the jurors may hear, will you raise your voice as best you can?

A. Yes, I will.

Q. Are you acquainted with Samuel Ormont, the defendant in this action? A. I am.

Q. About how long have you known him?

A. Since about 1942, in July.

Q. By the way, what is your business, please?

A. I am secretary and treasurer of the Los Angeles Livestock Exchange.

Q. And in connection with that business have you had occasion to have dealings with Mr. Ormont?

A. I have. [1292]

Q. And do you know of others, acquainted with others who have had dealings with him?

A. Yes, I am.

Q. Do you know the reputation of Mr. Ormont for truth, honesty, integrity and fair dealing in

(Testimony of Mrs. Mary Reardon.)

the community where he transacts business or in the community where he resides, either place?

A. My office acts as a clearing house——

The Court: No, no.

Mr. Robnett: Do you know his reputation?

The Court: Do you know his reputation, either in the community where he transacts business or where he lives?

The Witness: As far as I know, in my office——

The Court: Just answer that one yes or no. Do you know his reputation for truth, honesty and integrity?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Robnett): What is it, good or bad? A. It is good.

A. It is good.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. Just one question: Do you know anything about Mr. Ormont's income tax return? [1293]

A. I do not.

Mr. Strong: That is all. Thank you.

The Court: You may be excused.

(Witness excused.)

Mr. Robnett: We would like to call Mr. Haimer.

HIGH HAIMER

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: High Haimer.

The Clerk: Your address?

The Witness: 5214 Ruth Ellen.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Haimer, what is your business?

A. Grocery business.

Q. Are you acquainted with Samuel Ormont, the defendant in this action? A. Yes, I am.

Q. How long have you known him?

A. About 20 years.

Q. Have you had any dealings with him?

A. Well, mostly of a personal account, I mean as a [1294] friend.

Q. Mr. Haimer, are you acquainted with other persons who have been acquainted with Mr. Ormont? A. I am.

Q. Do you know Mr. Ormont's reputation for truth, honesty, integrity and fair dealing in the community in which he resides or in the community in which he transacts business?

A. It has always been very favorable.

Mr. Robnett: You may cross-examine.

(Testimony of High Haimer.)

Cross-Examination

By Mr. Strong:

Q. Do you know anything about his income tax during the year 1944?

Mr. Robnett: I object to that as not proper cross-examination.

The Court: Objection sustained.

Mr. Strong: No questions.

The Court: Next witness.

(Witness excused.)

Mr Robnett: Mr. Jeal.

ALBERT JEAL

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows: [1295]

The Clerk: Will you please state your name?

The Witness: Albert H. Jeal; J-e-a-l.

The Clerk: Your address?

The Witness: 4808 Victoria Avenue.

The Clerk: Los Angeles?

The Witness: Yes.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Jeal, what is your business?

A. I am junior vice president and manager of the Citizens National Trust and Savings Bank, the Los Angeles Union Stockyards.

(Testimony of Albert H. Jeal.)

Q. How long have you been engaged in such business?

A. Well, I have been there for the past 11 years.

Q. Are you acquainted with Samuel Ormont, the defendant in this action? A. I am.

Q. How long have you known him?

A. For the past 10 or 11 years.

Q. Have you transacted any business with him?

A. Yes, I have.

Q. Do you know others who know Mr. Ormont?

A. I do.

Q. I will ask you if you know Mr. Ormont's reputation for honesty, truth, integrity and fair dealing either in the [1296] community in which he resides or the community in which he transacts business.

A. Very good in the community in which he transacts his business.

Mr. Robnett: Thank you. Cross-examine.

Cross-Examination

By Mr. Strong:

Q. Are you acquainted with the charges in this case?

Mr. Robnett: I will object to that, your Honor.

The Court: This witness was up here once before.

Mr. Strong: He did look familiar.

The Witness: You called me, Mr. Strong?

Mr. Robnett: I submit that it is not proper cross-examination.

(Testimony of Albert H. Jeal.)

The Court: The objection is sustained; not proper cross-examination.

Mr. Strong: No questions.

(Witness excused.)

The Court: Next witness.

Mr. Robnett: Mr. Campton, please.

BENJAMIN W. CAMPTON

called as witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name? [1297]

The Witness: Benjamin W. Campton; C-a-m-p-t-o-n.

The Clerk: Your address, Mr. Campton?

The Witness: 3399 East Vernon Avenue.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Robnett:

Q. What is your business, Mr. Campton?

A. I am president and executive secretary of Meat Packers, Inc., a trade association.

Q. And you have been such for some time, have you?

A. For the past nine years; yes, sir.

Q. Are you acquainted with Samuel Ormont, the defendant in this action?

A. I am. [1298]

(Testimony of Benjamin W. Campton.)

Q. How long have you known him?

A. Well, in excess of 10 years.

Q. Are you acquainted with other persons who know Mr. Sam Ormont? A. I am.

Q. I will ask you if you know Mr. Ormont's reputation for truth, honesty, integrity, and fair dealings, in the community in which he transacts business, and in the community in which he resides?

A. In business affairs I do; they are very good.

Mr. Robnett: Thank you. You may cross-examine.

Mr. Strong: No questions.

The Court: You may be excused.

(Witness excused.)

A. R. PHILLIPS

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

A. A. R. Phillips.

The Clerk: Your address, Mr. Phillips?

A. 111 West Seventh Street.

Direct Examination

By Mr. Robnett:

Q. Mr. Phillips, what is your business?

A. Insurance broker. [1299]

Q. You have been a resident of Los Angeles County, have you, for a number of years?

A. About 30.

(Testimony of A. R. Phillips.)

Q. Are you acquainted with Samuel Ormont, one of the defendants in this action? A. Yes, sir.

Q. How long have you known him?

A. Approximately 10 years.

Q. Have you had any business dealings with him? A. Yes, sir.

Q. Do you know others who are acquainted with Mr. Ormont? A. Yes, sir.

Q. I will ask you if you know Mr. Ormont's reputation for truth, honesty, integrity and fair dealings in the community in which he transacts business and in the community in which he resides?

A. I do.

Q. Is it good or bad? A. Excellent.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. You have dealings in insurance with Mr. Ormont? A. Pardon?

Q. You have dealings with reference to insurance with [1300] reference to Mr. Ormont?

A. Yes, sir.

Q. Do you sell him insurance?

A. He buys some insurance from me.

Mr. Strong: Thank you.

The Court: You may be excused.

(Witness excused.)

CHARLES J. LUMPP

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Charles J. Lumpp.

The Clerk: What is your address?

The Witness: 2822 Cudahy Street, Walnut Park.

Direct Examination

By Mr. Robnett:

Q. Mr. Lumpp, what is your business?

A. I am vice president and general manager of the Los Angeles Union Stock Yard Company?

Q. You have been such for a number of years, have you?

A. I have been in that position since 1942.

Q. Prior to that you were connected with them?

A. Yes, sir, I have been with them for 25 years.

Q. Are you acquainted with Samuel Ormont?

A. I am. [1301]

Q. How long have you known him?

A. In excess of five years.

Q. Have you had any dealings with Mr. Ormont?

A. Not directly, no, sir.

Q. Are you acquainted with other people who do know Mr. Ormont? A. I am.

Q. Do you know his reputation for honesty, truth, integrity and fair dealing in the community in which he transacts business, or in the community in which he resides?

(Testimony of Charles J. Lumpp.)

A. In the community in which he transacts business, I do.

Q. Is it good or bad? A. It's good.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. That business is the meat business?

A. Livestock.

Q. Your business is that of livestock?

A. Yes.

Q. Buying and selling?

A. No, we run a hotel for livestock; operate a hotel for livestock.

Q. For livestock or people? [1302]

A. For livestock.

The Court: When you check them out they are dead?

The Witness: No, sir, they are alive, Judge. Most people don't know what a stockyard is, and that is why I called it a hotel for livestock. All we do is feed, water, weigh, including loading and unloading of livestock.

The Court: That includes Mr. Ormont's livestock?

The Witness: Livestock he purchased in the stockyards.

Q. (By Mr. Strong): Just what is the nature of your dealing with Mr. Ormont?

A. All during the period I have known him.

(Testimony of Charles J. Lumpp.)

Q. Do you mean he would bring livestock in?

A. No, sir, he purchased at the yard.

Q. Then he paid for it?

A. Paid for it through the Los Angeles Live-stock Exchange. We performed the services of loading it out.

Q. Those are the only transactions you had with Mr. Ormont? A. Yes.

Mr. Strong: That is all.

Mr. Robnett: Is he excused?

The Court: Yes, the witness may be excused.

(Witness excused.) [1303]

JOSEPH SMITH, JR.

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: May I have your name?

The Witness: Joseph P. Smith, Jr.

The Clerk: Your address?

The Witness: 16121 California Avenue, Santa Monica.

Direct Examination

By Mr. Robnett:

Q. Mr. Smith, what is your business?

A. I am a cattle dealer.

Q. Have you been such for a number of years?

A. Yes.

Q. Are you acquainted with Mr. Samuel Ormont, the defendant? A. I am.

Q. How long have you known him?

A. Three years.

Q. Do you know others who know Mr. Ormont?

A. Yes.

Q. I will ask you if you know Mr. Ormont's reputation in the community in which he transacts business for truth, honesty, integrity and fair dealing?

A. Yes, sir, it is very good.

Mr. Robnett: Thank you. You may cross-examine. [1304]

Mr. Strong: No questions.

The Court: You may be excused.

(Witness excused.)

D. H. LILLYWHITE

a witness called by and on behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: D. H. Lillywhite.

The Clerk: Your address?

The Witness: 3609 West Vernon Avenue.

Direct Examination

By Mr. Robnett:

Q. Mr. Lillywhite, what is your business or occupation?

A. I am in the livestock commission business.

Q. Do you have a company?

A. D. H. Lillywhite Company.

(Testimony of D. H. Lillywhite.)

Q. Do you hold any official position in that company? A. I am the proprietor.

Q. How long have you been in that business?

A. Since 1921.

Q. Are you acquainted with Mr. Samuel Ormont? A. Yes.

Q. How long have you known him?

A. I have known him about 25 years. [1305]

Q. Do you know Mr. Ormont's reputation as to truth, honesty, integrity and fair dealing in the community in which he transacts business?

A. I do.

Q. State whether it is good or bad?

A. It's good.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. When did you last discuss with anyone Mr. Ormont's reputation?

A. I beg your pardon?

Q. When did you last discuss with anyone Mr. Ormont's reputation?

A. I have not discussed it with anyone.

Q. Not at all? A. Not at all.

Q. Never? A. No.

Q. How do you know what it is?

A. Because he has been around me there about that length of time.

Q. Around you? A. Yes.

(Testimony of D. H. Lillywhite.)

Q. Then I understand you are testifying to what your [1306] opinion is of Mr. Ormont; not his reputation?

A. My opinion of his reputation.

Q. You have no other opinion but your own?

A. After 25 years, I think I would know pretty well.

Q. You haven't talked with anybody else about it?

A. I wouldn't have to. I have had personal dealings with him.

Mr. Strong: That is all.

The Court: You will be excused.

(Witness excused.)

JULIUS SCHWARZSCHILD

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Julius Schwarzschild.

The Clerk: Your address, Mr. Schwarzschild?

The Witness: Residence?

The Clerk: Yes.

The Witness: 2505 West Sixth Street.

Direct Examination

By Mr. Robnett:

Q. What is your business or occupation, Mr. Schwarzschild?

A. Manager of Bissinger & Company.

(Testimony of Julius Schwarzschild.)

Q. What business are they engaged in?

A. Handling hides, skins, and tallow. [1307]

Q. How long have you been manager of that company?

A. I have been with the firm about 47 years.

Q. Are you acquainted with Mr. Samuel Ormont, one of the defendants?

A. Yes, I do know him.

Q. How long have you known him?

A. I would say about 15 years.

Q. Do you know others who know Mr. Ormont?

A. Yes.

Q. Do you know other people who are acquainted with him? A. Oh, yes, sir.

Q. I will ask you if you know Mr. Ormont's reputation for truth, honesty and integrity and fair dealing in the community in which he transacts business?

A. I have never had any reason to question it. I have done a lot of business with him, and he always was open and above board.

Q. I do not understand.

The Court: He said: I never had any reason to question it. I have done a lot of business with him, and it was always open and above board. He hasn't answered your question.

Mr. Robnett: No. Do you know his general reputation in the community in which he transacts business for truth, honesty and integrity and fair dealings? A. Good. [1308]

Mr. Robnett: Thank you.

(Testimony of Julius Schwarzschild.)

Cross-Examination

By Mr. Strong:

Q. When did you last discuss his reputation with someone?

A. I did not discuss it. I haven't discussed it at all, because I was away on a vacation, and did not even know the trial was going on until they called me to come up here.

Q. Before vacation?

A. I did not have to. I have had business dealings. I met people who know him, and I did not have any special discussion.

Q. You never had any special discussion?

A. No.

Q. What you are giving us is your opinion of Mr. Ormont; not his reputation in the community?

A. And I know other people who have had business with him, too.

Q. You haven't discussed it with him, have you?

A. No, not discussed it.

The Court: Did you ever ask them about it; what they thought of him, or did they ever tell you what they thought of him?

The Witness: No. I have known Mr. Ormont. I have had business dealings with him. I did it because I knew other people, and I have talked with them, and knew it was a safe [1309] account. I knew other people doing business with him before I did. Then he did his, and I haven't had any doubt about it.

(Testimony of Julius Schwarzschild.)

Q. You don't know his reputation in the community, but just so far as you are concerned?

A. My transactions have been with him.

Q. Do you still feel that is his reputation?

A. I am still doing business with him.

Q. In deciding what you think of him, did you take into account the facts in this case?

Mr. Robnett: I object to that.

A. I don't know. I never heard of the case.

The Court: Just a minute.

Mr. Robnett: I object upon the ground that it is not proper cross-examination.

The Court: The objection is sustained.

Mr. Strong: That is all.

Mr. Robnett: Thank you. If the Court please, the defendant Sam Ormont rests.

The Court: Any rebuttal?

Mr. Strong: Recess? I will go through my papers. I will see if there will be any. I will try to shorten it, if there is any.

The Court: We will have a short recess while Mr. Strong looks through his papers.

(Short recess.) [1310]

The Court: Usual stipulation?

Mr. Strong: Yes, your Honor.

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

The Court: Is there any rebuttal?

Mr. Strong: The Government rests as to both defendants.

The Court: The Government rests, and the defendants rest.

The matter of the argument will not proceed until after I have had an opportunity to consult with counsel concerning instructions, so that in their argument to the jury they may know what instructions I will give on the law.

If you have all of your instructions ready——

Mr. Robnett: We are trying to get them ready, your Honor.

The Court: Very well.

Mr. Robnett: We will have them in a few moments.

Mr. Strong: May the record show I have given a copy to each of defense counsel of my instructions and two copies to your Honor, the original and a copy?

The Court: Very well.

That being the case there will be no further need of the jury this afternoon pending the conference. I doubt if we can proceed with the conference probably until tomorrow morning in order that each side may have an opportunity to examine [1311] the instructions submitted by the other, so that you may formulate your notions concerning them. For that reason the jury will be excused until 10:00 o'clock tomorrow morning. Remember the admonition.

(The jury retired from the courtroom at 3:20 o'clock p.m.)

(The following proceedings were had outside the presence of the jury.)

The Court: Now I notice in the instructions that were handed up to me by both defendants that there were general instructions. I have a set of general instructions about the weight of the evidence and what a presumption is and an inference and a definition of reasonable doubt, and so forth, so you might save time—these are two different cases in which I gave them—but I will give each one of you a copy. I think you are familiar with them, Mr. Strong.

Mr. Strong: Yes, your Honor.

The Court: Will you wish a copy?

Mr. Strong: No, your Honor.

The Court: Very well. The defendants may have this copy.

Mr. Kosdon: Thank you, your Honor.

The Court: How soon can you get your instructions to me? Can you get them to me this afternoon so that I can be looking at them?

Mr. Robnett: We will try to, your Honor.

Mr. Katz: Your Honor please, I have some instructions that I find it necessary to redraw because of the granting of one of the motions that was made yesterday—I should say the granting in part of one of the motions made yesterday—and I would like to have an opportunity to do that this evening and submit my instructions complete to your Honor tomorrow morning. I handed them in fairly early and I thought they were in complete shape except for such additional instructions that I might have later.

The Court: If you can bring them in at 9:00 o'clock.

Mr. Katz: Yes.

The Court: Do you wish a copy for your office of these same general instructions?

Mr. Katz: I would appreciate it.

The Court: Very well. You will return them to me. They all follow the same general idea.

Very well. The court will recess until 9:00 o'clock tomorrow morning. The conference will be in chambers where we can be more informal than otherwise. And it will be necessary for the defendants to be present.

Mr. Strong: Your Honor, before your Honor recesses, I have marked for identification certain original income tax returns which are marked as Government's Exhibits 57, 58, 59, 60 and 61 for identification. They were the ones that were used in connection with the witness Ormont. May I at this time withdraw these so that I may return them to the Internal Revenue Bureau?

The Court: They may be withdrawn.

Mr. Robnett: Your Honor, I will want to renew motions that I made at the close of the Government's case. [1314]

The Court: I think now would be an appropriate time to do that.

Mr. Katz: If the Court please, at this time I move the Court for an acquittal of the defendant Himmelfarb under Count 2 of the indictment, which is the only count which attempts to state an offense against the defendant.

In making this motion I wish preliminarily to make the observation, if the Court please, that it is

my thought that in any case where there is any doubt in the mind of the Court that such doubt should be resolved in favor of the defendant, but in this case particularly I think that principle should be applied because I don't believe that there is any question in the mind of your Honor—I know that there isn't in mine—that the very nature of this case is such that it must of necessity lend itself and result in confusion in the deliberations of this jury on the question of guilt or innocence of these defendants, and I say that for this reason, if your Honor please, I believe it is true that those who are trained and experienced in the field of law find it very difficult to segregate evidence that has been admitted against one defendant only from the evidence admitted against the other and in such deliberations to weigh the evidence and determine it solely upon the evidence admitted as against one defendant and against that defendant alone, where all the evidence came [1315] in during the course of the same case and same trial, and part of it, by far the more substantial part, came in as against one defendant.

Now with that preliminary observation, if the Court please, I proceed, and if I may take the time to do so, I regard this motion as a very important step in this proceeding. I am not making it merely as one of the rights available to a defendant merely to preserve a record; I make this motion in all sincerity because I believe in the motion I am making. I believe that that motion is well taken.

I have gone over the transcript in this case, if the Court please, to determine for myself just exactly what there is in the way of evidence that has come into this case as against the defendant Himmelfarb, and I find that we have Exhibit No. 4, which is an income tax return of the defendant Himmelfarb for the year 1944, and Exhibit No. 5, income tax return of Ruth Himmelfarb for the year 1944, without any testimony relative to those exhibits at all.

We have Exhibit No. 6, which is a joint venture return for the fiscal year of May 1, 1944 to April 30, 1945 and no testimony with respect to that exhibit except Exhibit No. 6 was signed by the defendants and that the division of the profits that was shown in there was made pursuant to the direction of the defendants.

Now we find that the first witness in this case was Albert D. Allen, and he took the stand and was excused. That was the man that came down from the tax record office who didn't have a truck large enough to bring the records down and stipulations took care of the amounts that would have been paid on the returns and stipulated to as to the returns. Consequently there was no testimony from him. [1317]

The next witness was Mr. Baizer, who identified records respecting Mr. Ormont only.

The next witness was James E. McClung, who identified records of Mr. Ormont only.

The third witness in the case—I am eliminating Mr. Allen, if the Court please—No. 3 was Mr. Jehl, who identified bank records of Mr. Ormont only.

The next witness was Mr. Thomas Miller, the fourth witness in the case, from Merrill Lynch, Pierce, Fenner & Beane, who identified, which he prepared and testified to, Ormont's records only.

The next witness was Mr. Pingree, the fifth witness in the case, who only identified the bank records of the First and Chicago Branch, of the defendant Himmelfarb.

At that point we have Exhibits Nos. 32, 33, 34, 35 and 36, which came into evidence based merely upon the identification of them. Those were bank records, without any testimony at that time, or subsequently, with respect to the matter contained thereon.

The sixth witness in this case, if he Court please, was Mr. Link. His testimony was exclusively directed toward the defendant Ormont, save and except,—and this is the testimony as I have read it, directed against Mr. Himmelfarb, that he saw the defendant Himmelfarb perform work in the premises of the Acme Meat Company during 1944 and 1945; that he saw him [1318] make out invoices to customers; that he would compute the amount due to a customer. He saw him make another computation on the list which he kept in the drawer; saw him sell beef, and other meat cuts; make audits, payroll checks, and checked against the books, but Mr. Link never saw him receive any money in connection with the list referred to.

The list contained customers and accounts, sometimes in the handwriting of Mr. Himmelfarb, and sometimes in the writing of Mr. Ormont. The profits of the Acme Meat Company for 1944 were

credited against Sam Ormont. That is the sole testimony of Mr. Link, and that, with the one exception, is the sole testimony in this case.

Mr. Eustice was the next witness. His testimony was directed exclusively against Mr. Ormont. Mr. Eustice went with us a long time, and I think has the distinction of being the major witness with the prosecution.

The next witness was Mr. Gorgerty, who testified in respect to insurance policies, and monthly reports that the witness made and signed.

The next witness in the case, which was the next one in order, was Mr. Phoebus. His testimony was directed against Mr. Ormont only.

The next witness was a Mr. Smith, whose testimony commenced with respect to Ormont only, and the stipulation by Mr. Ormont, with the prosecution, eliminated further testimony. [1319]

Then we have Mr. William Malin, whose testimony, insofar as it concerned the defendant Phillip Himmelfarb, was that he sent Exhibits 50-A and B to Mr. Bircher. Those are the affidavits and the letter, and that the information in those exhibits was obtained by Mr. Malin from Mr. Himmelfarb. That he mailed and prepared Exhibit 6, and that the information on the return came in part from others, and the items showing the divisions came from the defendants, and that Exhibit 6 was signed by the defendant Himmelfarb.

That, if the Court please, is the total of the evidence before this Court.

Now, it is quite obvious that, insofar as the testimony is concerned, there is no testimony that the defendants in this case earned any sum of money in excess of what was reported, and there is no indication of any amount he earned in excess, if we assume there was an excess, that there was any attempt to evade income taxes, whether there were any income taxes unpaid.

Consequently, we are limited, if the Court please, to the exhibits, as the silent, inanimate objects that they are and what can be gleaned therefrom, without any testimony to help, insofar as the determination is concerned, and establishing a criminal offense against the defendants.

With respect to the returns for the year 1944, of the defendants, they merely show the amount that he reported as [1320] income, and the deduction he has taken, and the tax that he has paid. That, in and of itself, does not establish any additional income, or any attempt to evade.

We turn then to Exhibit 6, if the Court please. That Exhibit 6 shows a joint venture. There isn't any testimony with respect to Exhibit 6 as against this defendant other than what I have called your attention to, which neither adds to, nor detracts from the exhibit in any way. That exhibit merely shows an income over a period from May 1st, 1944 to April 30, 1945.

It was my thought yesterday, and previously—it is still my thought today; it is not the Court's, I know—that that report of income for the period of May 1st, 1944 to April 30, 1945, does not in and of

itself establish that any part of that was earned in 1944. It might have been, but in order to arrive at the might have been, we must indulge in an inference and an assumption, and I don't believe inferences or assumptions, in and of themselves, are sufficient, if the Court please, to establish a criminal case, where the evidence is required to be beyond a reasonable doubt.

Assuming now, for the purpose of this discussion, that it does establish that part of the income for the period May 1st, 1944 to April 30, 1945, was earned in a part of April, there is nothing in the way of evidence, as against this defendant, that in any way establishes that there wasn't a joint venture; [1321] that there wasn't a fiscal period; that it wasn't properly reported, or that should have been reported in any other fashion than it was.

And even if we assume that we can from Exhibit 6 engage in another assumption and another inference, and base an assumption upon an assumption and an inference upon an inference, that part of it should have been, there is nothing before this Court that in any way indicates, so far as the defendant Himmelfarb is concerned, that there was anything in connection with any facts and circumstances to indicate wilfulness, or an attempt to evade, or an evasion of income taxes. [1322]

Now the indictment in this case, if the court please, charges that on or about the 14th day of March 1945—I am going to eliminate the reference to Ormont because this court has eliminated it—Phillip Himmelfarb wilfully—and that I believe is a matter

that your Honor must consider in determining this motion, as to whether the evidence establishes that he did wilfully, whether there is any evidence—knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by Phillip Himmelfarb in the United States of America for the calendar year 1944 by preparing or causing to be prepared and filed and causing to be filed a false and fraudulent income tax return. There is nothing before this court, in my opinion, of any evidence indicating that the 1944 return was filed that was false or fraudulent.

But this continues on to state, wherein they stated that his net income for the said calendar year, computing it on the community property basis, was \$4,111.74 for income tax purposes and that the amount of the tax due and owing thereon was \$656, whereas as he then and there well knew the net income for said calendar year computed on a community property basis was the sum of \$17,752.65, and that his net income he owed to the United States of America an income tax of \$5,843.91. I say to your Honor that there isn't a scintilla of evidence in this case from which your Honor or anyone else can say or [1323] can infer that Mr. Himmelfarb's net income for the calendar year 1944 computed on the community property basis was \$17,752.65. And I am not talking about that precise amount. There is no evidence of any amount as being the net income of this defendant of whatsoever kind or nature other than what he himself has reported in his 1944 return. And cer-

tainly there is no evidence that any tax on it was the amount of \$5,843.91 or any other sum in excess of what he showed. And this is with reference to the filing of the 1944 return which was filed on or about the date of March 15, 1945.

Then it continues on to say, by concealing and attempting to conceal from the Collector and all proper officers the true and correct gross net income received by him during the calendar year. I submit that with respect to the 1944 returns taken alone, or with respect to the 1944 returns taken together, that they don't establish and in and of themselves cannot establish with the aid of testimony, and there is none, an offense in this case. And because of the fact that I mentioned at the outset, this is one that prejudice can result if your Honor in resolving a doubt does not resolve it in favor of the defendant, a prejudice can result to the defendant which is not always true and present in other cases.

I think your Honor will agree with me when I say that the jury——

The Court: The motion could have been made for a separate [1324] trial. It wasn't made before me, and it doesn't appear in the record that it was made. If there was fear that there was some prejudice that might result from the trial of the two defendants together, a motion for a separate trial could have been made.

Mr. Katz: Your Honor, the matter of a separate trial was such, in the first place—I believe your Honor knows that I did not come into this

case until five days before the trial—in the second case, at the time that I did come into the case rather than being in a position of making a motion for a separate trial I stepped into a case in which the government was attempting to consolidate the trial of this case with another case, and under those circumstances I don't believe, at least the defendant Himmelfarb, can be charged with that.

The Court: I appreciate the difficulty with which counsel are confronted when they are representing separate defendants and there are multiple defendants charged, and for that reason, and for the reason that I would consider it in my duty in any event, I have taken the precaution which I thought the law would permit so as to prevent any prejudice coming to either one or the other of the defendants by virtue of any testimony, and I have repeated instructions and statements to the jury. While I realize that it is difficult in a long trial for one trained in the evidence, and probably [1325] for one who is not trained in hearing evidence and considering matters, to segregate all of the items, nevertheless that is the way the law requires it to be done, and one of the functions of the argument is for the lawyer representing the individual defendant to isolate only the testimony which relates to him.

Mr. Katz: If the court please, I don't believe there is any question that in any view of this case, even by one prejudiced against him, in so far as the evidence against Himmelfarb is concerned, but must of necessity be that it is very thin. My con-

tention to your Honor is that it goes to the point that it is so thin it is transparent, and what I am asking this court to do is to look through it, with this thought in mind, that the jurors not only have in this case the effect of the intermingling of testimony in one case which they must segregate, but there are certain evidence that came in as against the defendant Ormont which is of a nature that in and of itself, while it shouldn't be considered by the jury in arriving at any determination as to guilt and innocence, it is the kind and type of testimony that inevitably and of necessity prejudices jurors against defendants. And it is evidence that came in against another defendant which will inevitably prejudice a defendant as against whom that evidence didn't come in.

It is because of all those factors in this case and because [1326] this court can, in the light of the evidence and in the light of this record, exercise the power that it has to grant the motion that I make, that I ask this court so to do.

The Court: Counsel, I followed the testimony that has come in since the previous motion, and there has been nothing in it that would cause me to change the conclusion which I reached upon consideration of your motion at the end of the government's case. I am still of the same opinion that it should be denied, and it will be denied.

I will not assign my reasons, that is, by resume of the testimony, that I think connects the defendant with it because that is the prosecution's job to the jury and prejudice might result to the defend-

ant were I to make the analysis of testimony which I think I should do and am doing at this stage of the trial.

The motion on behalf of the defendant Himmel-farb for a judgment of acquittal as to count 2 will be denied.

Mr. Katz: If the court please, I now wish to move to strike from the record Exhibits 36-B and 36-C.

(The documents referred to were passed to the court.)

Mr. Katz: This motion to strike is, if the court please, in effect a renewal of an objection originally made to the introduction of them in evidence.

My objection is based upon these grounds: Exhibits 36-B and 36-C were admitted without foundation because other [1327] than the testimony of Mr. Pingree that they were the records of the bank and to which account, they have never been connected up by way of testimony in any form.

The Court: 1942 and '43 is 36-C, and 36-B is 1945, and 36-A is 1944, I guess.

Mr. Katz: Yes.

First and foremost, those cover periods that are prior and subsequent to the period involved in this case. They are not within the issues and there has been no testimony to indicate that any——

The Court: Yes, I think these ought to be stricken.

Mr. Strong: Your Honor please, may I be heard?

The Court: Yes.

Mr. Strong: These exhibits were produced at the demand of the defendants. As your Honor recalls, I put in certain exhibits——

The Court: They were not introduced in evidence; they were merely produced.

Mr. Strong: As part of the picture as to what the account was, and the witness had to go back to his bank and come back here and it made an impression, as far as I am concerned, as though we were keeping something from the jury here. Then these things were brought in and then they were attached as a part of that document.

As an additional reason I have this, the defendants have [1328] now introduced the returns for 1945 in connection with their hypothetical-question witness here this morning, as to Mr. Himmelfarb and the entire question of income and when it was earned and whether it was properly reported, whether it was part of the income for 1944 or part of the income for preceding years or for succeeding years, is one of the questions before the jury. They have to determine what the income was that the defendant Himmelfarb earned during 1944 and how much of it was reported and how much of it he didn't report. I think on that basis even if nothing more that that exhibit should be present.

The Court: I think that 1945 probably by virtue of admission of the defense matter, which is to say 36-B ought to stay in the record.

Mr. Katz: May I say this in that connection, if the court please, that with respect to the period 1945 there has been no testimony respecting either

the matter of deposits or withdrawals. There is nothing to show that any part of it was income, nothing to show that it wasn't income that wasn't reported, and then to receive in evidence without such a foundation and to permit counsel to approach the jury and read figures from records of this type where it hasn't been connected or established by evidence, to state to them that this is unexplained income from the standpoint of the prosecution, it may have a semblance of truth in it because [1329] they haven't explained it to be anything, and it isn't incumbent upon the defense to show anything.

The Court: I haven't seen myself change my mind so often, but you have talked me out of it again.

Mr. Strong: May I go back to it?

The Court: Exhibit 30-C is stricken from the record. Exhibit 36-B, while it is not admissible in connection with the 1945 return, I think that there is not sufficient foundation for it and it well might be that this would be highly prejudicial. It shows, for instance, a deposit of \$21,000, another one for \$16,000, in the early part of 1946, and \$300, and the like. I do not think that there is sufficient foundation to admit it. [1330]

Mr. Strong: Will your Honor inform the jury when they come in that those exhibits were stricken upon motion of the defendant Himmelfarb?

The Court: If somebody will remind me of it, I will.

Mr. Strong: I will, your Honor.

The Court: Very well.

Mr. Katz: Now, if the Court please, I am going to make a motion upon the same grounds and for the same reason that there hasn't been any testimony connecting 36-A, 32, 33, 34 and 35 in any way with this case other than they are bank records.

The Court: Let me see them.

(The documents referred to were passed to the Court.)

Mr. Katz: There is no foundation laid for them and I believe that they too should be stricken.

The Court: Now 33 is a deposit ticket in 1945, May 26th. I don't believe there is any foundation for that.

Mr. Strong: That is two days after the fiscal year return, your Honor. The jury may draw inferences which I may argue, if your Honor permits.

The Court: I do not think it will be material.

Mr. Strong: It goes to willfulness, your Honor.

The Court: Exhibit 34 is dated January 20, 1945. That is within the period covered by the 1945 return, Exhibit 6. Exhibit 32 is the signature card of the defendant Himmelfarb. [1331] Exhibit 35 is a check of January 20, 1945. Exhibit 36-A is the 1943 and 1944 bank statements.

The motion to strike Exhibit 33 will be granted, and it will be denied as to Exhibits 32, 34, 35 and 36-A.

Mr. Robnett: Your Honor please, at this time on behalf of the defendant Samuel Ormont, I wish to renew the motion I made at the close of the

Government's evidence to strike various parts of the evidence without repeating it, if I may.

The Court: I granted part of your motion.

Mr. Robnett: You granted part, but the part that was not granted. I move to strike Mr. Eustice's testimony, if you will recall, and the bond records.

The Court: Yes, I recall.

Mr. Robnett: Without restating it and the grounds, I would like at this time to renew that motion.

The Court: The motion is denied.

Mr. Robnett: Now at the same time I would like at this time to renew my motion that I made at the close of the Government's evidence for an acquittal of the defendant Samuel Ormont, deeming it a separate motion as to each count, Count 1, Count 3 and Count 4, and on the same ground that I stated before, including the ground of once in jeopardy.

Also I wish to call your Honor's attention in that respect—in respect to the motion in general, I mean—to what I conceive to be the rule that I think should apply in [1332] passing upon those counts, taking them separately, particularly Counts 3 and 4, Count 4 being for 1942 and Count 3 being for 1943. Your Honor expressed certain views on that, you will recall.

I want to call your Honor's attention to two cases, *Edwards v. United States* 7 F(2d) 357, and *Wright v. United States* 227 Fed. 855, and which are cited in *Housel and Walser*, Second Edition, on page 540.

The Court: Housel and Walser about what?

Mr. Robnett: "Defending and Prosecuting Federal Criminal Cases." [1333]

There is said in there,—and those cases are cited as supporting that—the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt. The burden of proof is upon the Government. Consequently, evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. And unless there is substantial evidence of facts which excludes every reasonable hypothesis but guilt, it is the duty of the trial court to instruct the jury to return a verdict for the defendant. It used to be that we asked for an instructed verdict, and now it is by a motion for acquittal.

The Court: The same rule, but a change in name.

Mr. Robnett: That is right. But the basis upon which your Honor has authority to act, I believe is a part of the text I read, that where the evidence is as consistent with the presumption of guilt—

The Court: I will so instruct the jury. But that is up to them, to weigh the evidence. I cannot, at this stage of the proceedings, weigh the evidence.

Mr. Robnett: But, your Honor, it is difficult, I think, hearing the case, to not hear the evidence and arrive at a conclusion, which I believe you have, as to those two counts. Particularly, there is no substantial evidence there to sustain a verdict, and that the verdict should be for the defendant Samuel

Ormont on those particular counts, because all the [1334] evidence of the plaintiff, practically all of it, or the gist of the case, is based upon hearsay, and such like, and though even mere opinions, and things like that can still be true, and he can be innocent, as we have illustrated here in this case, by the cross examination, and also in the evidence I have introduced here.

Mr. Eustice took checks, and said he did not know what they used them for, he did not know what was done with these, and therefore he charged it up as certain unexplained funds; that he bought certain bonds, and that they have not been explained, and, therefore, in doing the reverse of what is the rule, they are making the defendant prove his innocence rather than presume he is innocent; and making the Government prove guilt. And I think your Honor should yourself grant an acquittal, which is like the old instruction to return a verdict of acquittal.

The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.

Mr. Robnett: Those are the ones I am urging this motion to, your Honor. The Government is throwing the burden on us to prove innocence, by coming in, and saying this was not explained, and, therefore, if your Honor sends us to the jury with that kind of evidence—— [1335]

The Court: I am inclined to think you are right as to 1942 and 1943. There isn't any evidence in the record which is similar to that as to 1944, which, without commenting on the weight of the evidence, certainly indicates that the jury can reasonably conclude, beyond a reasonable doubt, that the defendant did receive some considerable sum of money in 1944, which he reported by his 1945 joint return.

But, on Counts 2 and 3, the whole case is built up by an arbitrary accounting method used by the Government agent. When I say "arbitrary" I mean not in a critical sense. I mean in the sense that he takes a figure and says, "This is it."

Mr. Robnett: Just a theory.

Mr. Strong: I thought we had gone into all that.

The Court: We did, but as I indicated, I am not too sure that my conclusion was correct. In fact, I gave consideration to reversing myself on my own motion.

Mr. Strong: If your Honor please, first I would like to correct an impression which I think Mr. Robnett was unfair in leaving with this Court. Mr. Eustice never said: I can't account for it, or haven't accounted for it. It was the defendant who accounted for it.

The Court: That is Mr. Robnett's point. Mr. Eustice said the defendant could not explain this, and he charged it to income.

Mr. Strong: There are cases which say precisely that [1336] procedure is admissible; that any money received by the defendant, and is not ex-

plained by him, and that came from other sources than income, is income. Mr. Eustice was not testifying from figures he pulled out of thin air. The records are right here in evidence. Even if Mr. Eustice did not express an opinion, I submit I can take the same records and argue to the jury from them just how much money the defendant deposited during that period to his account.

The Court: You can't take a person's books, and total his bank accounts, and reach a conclusion, and say that that is unexplained, as you can maybe in a civil case, where you can weigh the evidence only by the preponderance rule, and would be entitled to judgment. But this is a criminal case.

Let me say, the way I view it right now, that if I were sitting in judgment, without a jury, on Counts 2 and 3, I would be forced to acquit the defendant Ormont on Counts 3 and 4. But I am not sitting in judgment.

Mr. Strong: The test which Mr. Robnett gave to your Honor is not the test. The test is not whether your Honor, as a reasonable person would do it, but whether the evidence is such that no other reasonable person can possibly reach the conclusion that the defendant is guilty.

I submit on the record here your Honor cannot say there is no evidence here upon which some other reasonable people, in the four of twelve jurors, cannot reach a conclusion to the [1337] effect that the defendant is guilty with respect to those two counts.

The Court: It has to be substantial evidence.

Mr. Strong: Besides, all of the evidence of the books and records themselves, which are in evidence, and upon the evidence of Mr. Link, of the falsification of records during this period, at the request of Mr. Ormont, all of the sums of money which Mr. Ormont collected, but were not part of the money which he reported for those years; besides that, there is the testimony of the statements of the defendant himself in the form of this letter which he submitted, and this document went in evidence——

The Court: Not as to 1942 and 1943. Only 1944.

Mr. Robnett: That is right, your Honor.

Mr. Strong: There were other bases, your Honor. Before your Honor makes a definite decision, I would like your Honor to reserve ruling until at least tomorrow morning, because I am convinced that is the law, that the procedure followed by Mr. Eustice in allocating that money is the procedure required and permitted by the Internal Revenue to an agent, under circumstances such as this. I think I can show the Court that it is so held.

The Court: Yes, I think that you have probably been put to it a number of times on appeal, where, as the Circuit Court has remarked, where somebody is obviously guilty, they [1338] want to do so and so. I think it is not good law, on a criminal charge against a person, to let an agent, however credible he is, or sincere he might be, upon a hypothesis to build up a crime.

Mr. Strong: Your Honor, there are only some sources from which a person gets money. He either

earns it as income, or takes it in as a loan, which he has got to repay, or gets it from somewhere else, which he won't explain. That is also income.

The Court: Which he won't explain—there is a difference. If that were the case, there is another crime here, which these defendants have not been charged with—refusing to give evidence, or something like that. They might have charged him with the crime of refusing to give the information, but that is a different offense.

Mr. Strong: Will your Honor reserve ruling, so that I can bring authorities tomorrow morning? There is no haste, and I would like to have your Honor take the period from five minutes after 4:00 to 10:00 o'clock tomorrow morning, to hear a motion.

Mr. Robnett: It is a question of preparation, your Honor. We have to know before.

The Court: I think you have to know, before your instructions are in.

Mr. Strong: I don't assume your Honor will foreclose me [1339] from asking a reconsideration, in any event, tomorrow morning.

The Court: Then I would have to go to work, and let it go over.

Mr. Strong: We have Supreme Court cases, your Honor, which may be convincing.

The Court: Yes, there are a great many Supreme Court cases which condemn the method in connection with other matters. I am pretty familiar with the cases and law on the subject, I think, counsel.

I will grant the motion for a judgment of acquittal as to Counts 3 and 4, as to the defendant Sam Ormont; and the case will go to the jury as to the defendant Sam Ormont, on Count 1 only.

Mr. Strong: I will move your Honor to reconsider tomorrow morning.

Mr. Robnett: Your Honor, under those circumstances, I now move to strike all of the testimony and the evidence given by the witness Eustice, as to the years 1942 and 1943, upon the ground that it is incompetent, irrelevant and immaterial, and prejudicial, if it is allowed to remain in before the jury, as to 1944.

The Court: No, I think that can remain in the record as evidence of the intent or wilfulness of Sam Ormont as to his 1944 income.

The motion is denied. [1340]

Mr. Robnett: I move to strike all of the evidence of the witness Link, upon the ground that that evidence is prejudicial, particularly as to all the evidence as to 1942 and 1943.

The Court: For the same reason, in this type of offense that evidence is admissible to show state of mind of the defendant, and the possibility or probability, or the lack of it, as to whether or not, if he did anything, what he did was wilful.

Mr. Robnett: All right, I thank your Honor.

The Court: Don't thank me. I would not do it if I did not think you were entitled to it. We will recess until 9:00 o'clock in the morning, and as I indicated, it will be necessary for the defendants to be present.

(Whereupon, at 4:20 o'clock p.m. Wednesday, June 11, 1947, an adjournment was taken until Thursday, June 12, 1947, at 9:00 o'clock a.m.) [1341]

Los Angeles, California, June 12, 1947
9:30 o'Clock A.M.

CONFERENCE ON INSTRUCTIONS

(The following proceedings were had in chambers outside the presence of the jury:)

Mr. Strong: Before we start the instructions, if your Honor permits, I would like to be heard upon the question of whether or not the motions which have been granted on Counts 3 and 4 to dismiss should be reconsidered.

The Court: All right.

Mr. Strong: I would like to outline very briefly—I won't take up much time—the evidence which I think is sufficient to permit the counts to go to the jury.

First of all, of course there is the testimony of Mr. Eustice, which is predicated upon the books and records which are in evidence, and also upon the books of the Acme Meat Company which of course we cannot gain, and they are therefore for that reason not in evidence; but his testimony as to the contents of those books becomes the best evidence at this time.

Mr. Eustice in his testimony has accounted for all of the funds and has shown that in addition

there were funds which were not shown to have come from sources other than income. That testimony, your Honor expressed some concern over as being possibly insufficient. I would like to read just one short thing that I have here, which is a discussion [1344] of the type of evidence which the courts have accepted in criminal prosecutions to establish taxable income beyond that which had been reported, and the type of evidence that has been admitted as establishing taxable income beyond that which is reported, which was evidence with reference to what is shown by the bank accounts, simply periodical deposits in accounts which the taxpayer controlled, plus the showing that he had an income-producing business. Just those two things, deposits to his bank account and a showing that he had an income-producing business.

I would like to give your Honor some of the citations. First there is the case of *Gleckman v. United States*, 80 F. (2d) 394, certiorari denied 297 U. S. 709; *United States v. Miro*, 60 F. (2d) 58; *Oliver v. United States*, 54 F. (2d) 48, certiorari denied 285 U. S. 543; *Guzik v. United States*, 54 F. (2d) 618, certiorari denied 285 U. S. 545; *Caponi v. United States*, 51 F (2d) 609, certiorari denied 284 U. S. 669; *Orzechowski v. United States*, 37 F. (2d) 713; *Malone v. United States*, 94 F. (2d) 281, certiorari denied 304 U. S. 562; *Pascen v. United States*, 70 F. (2d) 491; *Sinner v. United States*, 58 F. (2d) 74; *United States v. Zimmerman*, 108 F. (2d) 370; *Shadrick v. U. S.*, 77 F. (2d)

961, certiorari denied 317 U. S. 637; *Kitrel v. United States*, 79 F. (2d) 259, certiorari denied 296 U. S. 643.

In all those cases the evidence which related to an analysis of the taxpayer's bank account and showing that he had [1345] taxable source, or rather a source of income, the mere fact that he had these deposits in the bank which were there and that he had a source of income, was sufficient to establish the Government's contention that that money was income even though it wasn't shown exactly where it came from.

The Court: Well, taking your first case here, the Gleckman case, just opening it and not reading the case, I see there were other elements that were present in that case. He used false and fictitious names and he used different banks scattered throughout different sections of the country.

Mr. Strong: That goes to his willfulness, your Honor.

The Court: It also adds the other element there that I do not think is present in this case.

Mr. Strong: I am pointing out the type of testimony.

The Court: And in most of the cases—I haven't read all of those cases but I have read a great many of them—in most of the cases upon which that was the sole type of evidence there was present an element similar to the one that I was suggesting here that was present in the Gleckman case.

Mr. Strong: I think that we have all of the other elements present here, and I would like to detail them now, if your Honor please.

The Court: All right.

Mr. Strong: Then of course we have the returns themselves for the two years which show what he reported. In [1346] addition to that we had testimony yesterday as to how much money the defendant said he accumulated and what he did with it. If your Honor remembers, the defendant said he was carrying a lot of cash around and one of the reasons, the main reason, was that his mother had had some difficulties with some bank. I think that although your Honor didn't permit me to ask this defendant the question of what deposits he made during those years, the deposits are in evidence and I can argue from them because the facts and figures are there, and I can show to your Honor and to the jury that in each and every one of the years that the defendant said that he was keeping out this money because he was worried about the banking situation and didn't want to keep his eggs all in one basket, that he had tremendous deposits in his personal accounts in the bank, for example, in the year 1941 he deposited \$21,000 and his income from his own income tax returns for that year was just a little over \$7000, and for the year 1942 those bank deposits show that he deposited over \$24,000 and his income, as he reported it for that year and as he himself testified, was in the vicinity of \$9000. I think that the jury is entitled to weigh the credibility of this witness who says that he had cash on

hand and even assuming he had cash on hand, on his own testimony he said that he spent between \$8000 and \$9000 in buying bonds during 1943 out of the \$11,000 or 12,000 cash he had. [1347]

But Mr. Eustice has accounted for over \$27,000 unexplained which were deposited during the period 1942 to April 30, 1944.

Then on the bonds themselves, your Honor, the bonds which were bought in 1943 totaled in excess of \$51,000, so even if he bought \$8000 worth of bonds, as he says, with the cash the jury still can consider the fact that whether he did have cash or didn't have cash and that all goes to willfulness. That is one of the elements. And that was the explanation which the witness himself gave.

The Court: It goes to willfulness and I have left it in.

Mr. Strong: It also goes to income.

The Court: As a matter appropriately in the record for the jury to determine, whether or not in 1944, if they find that he did not report his return, he failed to report it willfully.

Mr. Strong: I am referring only to the year 1943. It goes to willfulness as to 1943. The mere fact that he bought \$51,000 worth of bonds in 1943, which is way in excess of the income that he reported, plus the fact that he himself says that he only spent \$8000 or \$9000 out of his cash, if there were such cash to buy these bonds, there is that tremendous amount of unexplained bonds which he purchased during that year, and which is another element, plus the testimony of Mr. Eustice,

which I think we are entitled to have the jury consider [1348] in determining whether he had that income, especially since he is making tremendous deposits each year, especially since he is saying that he isn't putting all his money in there and at the same time he is putting so much more than he is keeping out that it makes questionable, to my mind, as to whether the jury will believe it. I think that they should have the opportunity of deciding whether to believe him or not.

Then there is the testimony of Mr. Link, the testimony that there were false entries on the very books of the Acme Meat Company; the effect of those false entries is to overstate the amount of money which was paid, and that means that he therefore eventually understated his net income by the amount that he overstated falsely, as Mr. Link showed, the amounts which he claimed were paid.

Besides that, as to 1942 we have of course the invoices which bear Mr. Ormont's signature, showing that he got that money, and Mr. Link testified that he entered every invoice, he testified that the income tax return was based upon information which was given to him by Mr. Ormont which he put on the books and that those omitted invoices were not part of that income tax, that they were held out. The fact that it was testified as income is shown on the face of these invoices. It says paid and it has Mr. Ormont's signature and a date and shows exactly when he received the money on each and [1349] every one of the invoices.

Then there is another item which I think has been overlooked. I called Mr. Smith, who testified about a loan that he had made from Ormont, and it was stipulated by Mr. Robnett, I believe, that the amount of \$63 was paid in interest by Mr. Smith to Mr. Ormont in 1943. If your Honor will look at the income tax return there isn't a single cent reported for interest. Now that is one of the items. That also tends to indicate that there was a concealment of \$63 which he never put down.

Then of course we have the bank deposits and the interest on the deposits. There is nothing as to interest in the 1943 return. Yet those bank deposits and those bank records will show that he did receive interest during that year.

Now for all of these items, I submit to your Honor, taken together they certainly furnish a sufficient basis for reasonable people to disagree. If that is the case I think the test has been met for sending it to the jury as to the year 1943.

I won't go into 1943 because it is thinner, it doesn't have all these elements, but these elements are present as to 1943, and I think that a very strong element present, a very strong one to my mind, is the fact that Mr. Ormont testifies he has only got \$12,000 in cash and he testified he accumulates it at the rate of between \$700 and \$1000 a year, and [1350] yet his bank deposits which are in evidence show \$24,000 deposited in 1942 as against his own reported income for that year of only some \$9000. And besides that there is \$21,000 reported in 1941 as against his income, which he admits himself, of some \$7400.

His explanation is subject on its face to the jury's questioning. And if the jury doesn't believe him they can take that into account in the entire situation as to what Mr. Link said on the false entries, that there is more reason to believe Mr. Link, and as to the omitted invoices there is more reason to believe Mr. Link. Mr. Smith nobody contradicts.

I submit to your Honor that as to 1943 there is sufficient evidence to permit the jury to have the case as to that year. That is Count 3 of the indictment.

The Court: Do you want to be heard further?

Mr. Robnett: Well, your Honor, I think this has been reviewed before.

In the first place, you will recall that Mr. Eustice himself—and that is what counsel is using as his evidence—Mr. Eustice is only giving an assumption and an opinion, but he accounted himself for \$37,000 worth of bonds that counsel is talking about and said he could trace all the funds for that \$37,000, that there were some \$13,000 or \$14,000 that he didn't trace. [1351]

Also on redirect he testified he didn't know what various checks and items were used for and therefore not knowing what they were used for he didn't trace those out as being for bonds. It has been proved here now conclusively—there is no dispute on it—that what particular checks were used to the tune of several thousand dollars and in the cash that Mr. Ormont testified that he used, and it shows that there are certain items of cash that

he did have all the way through from the time they talked to him in the first instance and they all admitted that he had substantial amounts of cash throughout the years, and they gave him no credit for that. The very fact that they didn't even consider all the evidence, they just arbitrarily ignored things they wanted to ignore and took in things they wanted to, I think that is sufficient.

The Court: As I see the Government's case on Counts 3 and 4, it is based principally upon the testimony of the witness Eustice. All these other things are deductive in their reasoning and I do not think it is sufficient. I will let my ruling stand as to Counts 3 and 4.

Now as to the instructions, these were just laid on my desk, these very voluminous instructions, and we certainly cannot go through all of these by 10:00 o'clock.

Mr. Katz: I do not believe so, your Honor.

Mr. Strong: And then I would like about half an hour after we are finished to prepare my argument. [1352]

The Court: If that is the case. I think we will go right ahead when the jury comes and excuse them to, say, 1:30.

Then how long will you want? This will only be as to one count now.

Mr. Strong: I would need at least an hour to an hour and a half for the defendant Ormont and at least half an hour to three-quarters of an hour as to the defendant Himmelfarb.

The Court: On opening?

Mr. Strong: Yes.

Then I need at least half an hour on my closing. That is a maximum. I won't say at least, probably since I am tired and also most of this has already gone in, I think the jury is pretty clear on it, so I will say the maximum is about an hour and a half on opening on Ormont and half an hour opening on Himmelfarb and a maximum of half an hour closing on Ormont and about 15 minutes closing on Himmelfarb.

The Court: I think in view of the fact that it is pending only as to Count 1 on each defendant now that the case seems to me wouldn't require that amount of argument because on Count 1 admittedly the defendant Ormont and the defendant Himmelfarb both with relation to that received a large sum of money—I won't admittedly but it certainly could be argued that it was—a large sum of money which they reported by their joint return. So Count 1 seems to me to turn upon the simple proposition as to whether or not they were or were not under the law entitled to file a fiscal year return. If they were not [1353] then the income was there and it is merely a matter of willfulness, it would seem to me. [1354]

Mr. Strong: Except we have been in trial four weeks, and most of that time has been spent by the defense in cross-examining my witnesses, and I feel it is my duty, in a case like this, to seek to clarify some of the matters which I considered were beclouded through cross-examination.

The Court: I want to get the case to the jury tomorrow. I would like to get it to the jury at

2:00 o'clock tomorrow, and give my instructions at 2:00, so that the jury will have the afternoon to deliberate on it.

Mr. Robnett: As I understood your Honor's ruling yesterday, after the motion was granted, I moved to strike certain testimony, and it was only allowed to remain in and be in on intent alone. Am I correct in that? That was all that volume of testimony went in for 1944 as to 1942 and 1943.

The Court: I allowed it to remain solely because the Government was entitled to have it in the record, and the jury is entitled to have it considered on the question of intent and wilfulness as to 1944. That is the only materiality of that evidence now.

Mr. Strong: And it will be limited to that situation?

The Court: Certainly.

Mr. Robnett: It shouldn't take you so long to argue then.

Mr. Strong: I think I am the best judge as to what I should argue in my case, Mr. Robnett. [1355]

Mr. Robnett: It wouldn't be for me.

Mr. Strong: To me every point consists of a lot of details.

The Court: I suppose you have agreed as to the one who may argue last?

Mr. Katz: No, as a matter of fact I am going to take the order, and I want to make my argument first.

The Court: Maybe we can conclude Mr. Strong's opening argument this afternoon, and your argument too.

Mr. Strong: I think we probably can.

The Court: And Mr. Robnett, if we start at 9:30 in the morning, should not take over two hours.

Mr. Robnett: I hope I don't need that. I don't know how much Mr. Strong will compel me to take, by his argument. I think I can finish in an hour, but I would not like to be limited.

The Court: We will hold to that schedule of completing your argument this afternoon, and Mr. Katz' argument.

Mr. Katz: On that basis that would allow me how much time, your Honor?

The Court: I think probably Mr. Strong will conclude his opening argument in an hour.

Mr. Strong: This technique of having me stand on the lectern will have a definite effect.

Mr. Katz: I prefer to use the lectern. I think it makes [1356] a better procedure.

The Court: It does. It is surprising how much easier it is to hear a lawyer when he is talking at the lectern, than when he is sitting down at a table in the court room.

Mr. Katz: I think it makes a better impression for the lawyer to stand.

The Court: I think probably Mr. Strong will be able to conclude his argument in an hour. He ordinarily is not very long winded. So that will give you whatever time you need to conclude your argument this afternoon. We will stay until it is finished.

Mr. Katz: I am in this position, because of the fact of the limited amount of testimony which came in, and everything else, I feel I must of necessity delineate what is in the record.

The Court: We will get on to the instructions. I haven't had an opportunity to glance through all of the instructions submitted by the defendants, but I notice the first fifteen or twenty of Ormont's are covered, I believe, by my general instructions.

Mr. Robnett: Possibly so.

The Court: Is that true of yours too, Mr. Katz?

Mr. Katz: That is true, your Honor, of a number of them. They are the first of the group of instructions. I just want to run through them. No. 14 is one that I submitted at the [1357] outset. I did not yank it. It became immaterial to my case.

The Court: Yes, you have it in there.

Mr. Katz: No. 15, I don't believe is covered by your Honor's general instructions.

The Court: No, it is not.

Mr. Katz: Nor is 16 covered by your general instructions. I don't believe No. 17 is. No. 18 may be, but in a different form. 19 is not.

The Court: On your No. 16, I think that is covered by your 15. 16 I don't think is the law. It goes too far, I think, but 15 is covered—character. As to 17, Mr. Strong has one of his instructions.

Mr. Katz: I don't know that 17 or 18 are covered.

The Court: 19; I have a general instruction on argument. 20 is the repetition of a general instruction.

Mr. Katz: I think that is correct. 21 is covered by your Honor.

The Court: Maybe 22. I will turn it over. 24——

Mr. Strong: I assume your Honor is not asking for objections?

The Court: No, I am trying to find out if I should consider these. I think 24 is covered by the question of wilfulness. So is 25.

Mr. Strong: Isn't 24 the same as 22?

The Court: I will turn over 26 and 27. 27 is the same [1358] as 28. 29 is covered.

30, under the heading of wilfulness; and 31, the Government has an instruction which I was just reading when you came in. I will turn that over.

Maybe 32.

33 again is wilfulness.

34 will be covered by the instruction on the fiscal year.

35 again is wilfulness.

36 again relates to wilfulness.

It may be that 37 should be given. I don't know.

38 is the same.

Mr. Katz: It is merely a duplication, your Honor.

The Court: 39 goes into wilfulness.

40. There will be an instruction covering the legal right of a person to avoid taxes, but not evade.

41 again relates to wilfulness.

42 relates to wilfulness.

43: There is an instruction the Government has. I will turn that over.

44 I will give.

45 relates to the same thing.

46. I will give the CALJAC instruction.

Mr. Katz: In connection with that, if the Court please. I didn't prepare it. Does your Honor feel it is proper to give an instruction in the case such as this, that they should [1359] consider, in their determination of the guilt or innocence of the defendant, certain evidence in such determination? I see my No. 46 is an adaptation of this.

The Court: "In the trial of this case there were instances where certain evidence was admitted against one defendant, and denied admission as against the other. Your attention was called to these matters when the rulings were made, but I would urge you again to keep in mind the distinction pointed out in such rulings and their effect. It may be difficult for you, when considering the case, for or against one party, to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to the evidence not admitted by the Court as against that party, and you must try conscientiously so to treat such a situation."

Mr. Katz: The portion that I omitted is the portion of it with respect to the rulings having been called to their attention.

The Court: 47 is a repetition of 46.

48 I will not give.

Neither 49. We have these marked out for consideration. That's the first batch I have tacked together. Were these general?

Mr. Kosdon: No, some are and some are not.

The Court: You haven't yours numbered?

Mr. Kosdon: No. [1360]

The Court: Reasonable doubt, is the first one.

Mr. Strong: Yes, reasonable doubt. That is a general one.

The Court: The first one is: "You are instructed to return a verdict of not guilty." That is instruction No. 1. I think that we had better have the jury come back at 1:30. Is that agreeable? I will have the Bailiff notify them.

Mr. Strong: That is agreeable, your Honor.

Mr. Katz: Satisfactory.

Mr. Robnett: We stipulate to that.

The Court: Will the Bailiff go up to the jury room and tell them they are excused until 1:30?

Verdict of not guilty, is out.

Reasonable doubt is covered.

The next one, "It is your duty to try this case fairly and impartially between the Government and the defendant."

Mr. Strong: Yes, that is No. 3.

The Court: That covers a presumption of innocence. That is covered.

The mere fact that an indictment has been filed. That is covered by a general instruction.

The individual opinion of each juror, is covered.

Presumption of innocence is not a matter of form, is covered.

Any essential fact necessary to complete a chain—is [1361] covered.

The fact must be proven consistent with the theory of guilt, is covered.

It is not your duty to look for a theory—that is covered.

Two or more reasonable inferences—that is covered.

The chain of circumstances—that is covered.

The next one is covered.

If you believe any witness in the case—There isn't anybody who falls within that category of hope of non-prosecution.

If you believe from the evidence in this case that any witness in the case was influenced or induced——

Mr. Kosdon: Not now.

Mr. Robnett: There could have been an inference from Link. He was an informer.

Mr. Strong: There is no showing that anything was held out.

The Court: They can still believe it from what he said.

Mr. Strong: I think, unless there is some showing that there is a possibility, from his having been prosecuted—but I won't even take the time to argue it. If your Honor wants it to go in, that is all there is to it.

The Court: Extra judicial oral admissions—that is covered. [1362]

Evidence of the defendants' good character. That is covered in the general instructions. I don't know whether it is the one I gave to you.

Mr. Katz: The one I had, I don't believe had reference to it, your Honor.

The Court: Extra judicial oral admissions is in the one I have in the Gage case. I also have one on expert opinion.

Mr. Katz: That one I referred to was on the matter of good character.

The Court: Extra judicial oral admissions or statements of the defendant alone. —I have that marked to give.

The next one, about general good reputation is covered by the one which I will give.

The one about it is neither criminal or unlawful for a person to do; that I will give.

Presumption. I haven't one in those words, but I think it is generally covered by the presumption of innocence. If you wish, I will give it.

You are instructed—the next one——

Mr. Katz: I have submitted a similar one.

The Court: I will lay it aside. The argument of the United States Attorney—I have a general instruction on arguments and statements of lawyers.

The next one about inconsistencies, and rational conclusions, is covered. Not in your language.

Presumption of innocence is covered.

Wilful intent. That will be covered.

Taxpayers on a cash basis.——

Mr. Strong: That is not the law, your Honor.

The Court: He is on a cash basis if he files his income tax return on a cash basis.

Mr. Strong: He says, unless he receives it.

The Court: He need not report it unless he receives it.

Mr. Strong: Constructive reports, deposited to his account. Anyway, I think that was for 1942. That is the only constructive receipt of income.

The Court: No, that is applicable to 1944 also. In other words, if Ormont should have been on a cash basis in 1944, then he received it.

Mr. Strong: I don't think there is any dispute of his being on a cash basis.

The Court: You are instructed if you find in the evidence that the defendant Sam Ormont—I think that ought to be given. [1364]

The Court: The next one now, the instruction as to government bonds bearing two different persons' names as co-owners, and so forth, I will say that I should put that one aside to consider.

The next one, livestock is an agricultural commodity and a product of the soil, what has that to do with this case?

Mr. Robnett: Your Honor, people engaged in that do not have to keep permanent books.

Mr. Strong: There is no evidence that Mr. Ormont is growing anything.

Mr. Kosdon: He is an agent in selling livestock.

Mr. Strong: It doesn't say selling, it says growing and selling.

The Court: Where does that begin?

Mr. Strong: It is the next instruction.

The Court: Those are out, those three instructions.

Mr. Kosdon: That books need not be formal? I think that is the law, your Honor.

The Court: I think maybe so.

Mr. Strong: We have an instruction on books.

The Court: I know you have but I will put it aside.

The next instruction, being a gift, what has that to do with this case?

Mr. Kosdon: There is evidence in the record that there were gifts, not only gifts but money was paid voluntarily, or [1365] whatever the so-called customer, whoever he was, was willing to pay.

Mr. Robnett: And there is evidence that people came in on days when they weren't buying at all and gave them money.

The Court: If that is the case then I should give an instruction on the Internal Revenue Code, if that is one of your defensive matters that you expect to argue, that there are gift taxes. This is a blanket charge to defeat and evade, and if the defendant was under compulsion to report or pay tax on gifts, that is another matter.

Mr. Robnett: I don't think he was as income. Gift taxes are a different tax.

Mr. Kosdon: It is an entirely different type of tax than the type of tax that is now before them, unless it is in excess of at least, I believe, \$3,000 from any one individual, if I am not mistaken.

Mr. Strong: As your Honor pointed out, all the evidence in this case in effect shows that they got that money, they reported it as taxable income, and the main problem is what year.

Mr. Kosdon: Maybe we might advise our clients to file for a refund.

Mr. Strong: They are fiscal year returns. It says nothing about gifts and neither does the 1944 return claim that it is gifts. They have no way of claiming it is gifts and there isn't any question involving gifts here. [1366]

Mr. Robnett: Mr. Ormont said something about gifts.

The Court: That there were extra charges.

Mr. Robnett: Yes, extra charges, and that they did at times, but they had no uniform charge and a lot of people weren't even charged, and that people came in at different times and gave them money and weren't at that time paying any bills. The charge here is evading income tax, not evading gift tax.

Mr. Kosdon: I have an instruction on that too.

The Court: On those two instructions on gifts, I cannot see that they are proper or should be in the case.

Mr. Robnett: May I at this time inquire if we are precluded from even discussing that phase if your Honor doesn't give an instruction?

The Court: Yes, you have to limit your argument to the matters given. That is the purpose of having this conference in advance.

Mr. Robnett: I think the evidence is in on those things and at least it has some bearing on the matter of intent in the case. It is quite important evidence, I would think.

The Court: I will consider those later.

The next one, that the indictment is a mere charge, that is covered.

The next one, the taxpayer who honestly or incorrectly returns his income, and so forth, that is covered by wilfulness. [1367]

Mr. Kosdon: If the Court please, I think there is evidence in the record to show that the defendant Ormont did go to counsel and that the return was prepared by a certified public accountant, and there is a case that the court specifically held the defendant was not guilty of any criminal intent.

Mr. Strong: That, however, was the 1945 return.

Mr. Kosdon: But on the other hand, if the Court please, it was with the advice of the attorney and the certified public accountant, and that the return was filed on a fiscal basis and was filed in the manner that it was. In other words, there were different methods by which perhaps if a tax were due and owing it could have been paid.

The Court: There is not any evidence in the record that the attorney advised them or that the certified public accountant advised them.

Mr. Strong: That was kept out by objections.

The Court: That is right, it was kept out by the objections. All the evidence was that they consulted an attorney and that the accountant filed the tax and sent these other things in. As to what the accountant told them, since neither defendant took the stand they waived the privilege. So there is not any evidence in the record to warrant the granting of that instruction which, for the purpose of the record, we will [1368] give a number as X-1, and you may have your exception.

Mr. Robnett: All right, your Honor.

However, let me call your Honor's attention to the fact that the accountant was a witness for the prosecution and testified that he received all his instructions from the attorney.

The Court: That is right.

Mr. Robnett: And there is evidence that the attorney was the attorney for the defendant.

The Court: Yes, I know, but in the first place that was in 1945, as to that return, and in the second place there was no evidence and it was kept out by objections which I sustained as to what the attorney told them or what the accountant told them.

The next one, the use of the word attempt in the Code indicates that Congress intended some wilful commission in addition to the wilful omission, that makes up a list of misdemeanors. This is not a misdemeanor, this is a felony.

Mr. Kosdon: That is right, your Honor.

Mr. Robnett: Change the word to felony.

Mr. Strong: The government's instruction reads as to the statute and explains it, your Honor. It explains it in the language of the Spies case.

The Court: I think that all comes under the heading of wilfulness and is covered.

Do you want an exception on that one? [1369]

Mr. Kosdon: Yes, I would like one.

The Court: It will be numbered X-2.

Mr. Kosdon: If your Honor please, as Mr. Strong pointed out at the beginning of the trial, 145(a) and 145(b) of the Internal Revenue Code both include the elements of willfulness. Before one

can be convicted under 145(a) one would also have to be found guilty of the element of willfulness. But I think the distinction between 145(a) and 145 (b) is that in one Congress had intended that some willful commission was done in addition to a willful omission. It is provided for in 145(a).

The Court: I think my general definition on willfulness covers the whole range and category of what constitutes willfulness.

Mr. Strong: And I have given an instruction based on the Spies case just on this very point, your Honor, and it goes into detail on it.

The Court: We will get to that later.

Incidentally, on your exceptions I am marking these and at the conclusion you can take your general objections for the record because unless you except you lose your point.

Mr. Kosdon: Yes, your Honor.

The Court: Now the next one, in weighing the testimony of Internal Revenue officers greater care should be used than in weighing the testimony of ordinary witnesses, I cannot give [1370] that instruction. I have one here on officers and employees of the United States which I give.

Mr. Kosdon: Yes, I noticed that, your Honor. I took that instruction from another instruction. There the word police officer was used and I merely modified it by using the word revenue agent instead of police officer.

The Court: The difficulty with that is that I think it is true in some instances and not in others. I think in this case here we had the example of

the two extremes. I think that the witness Eustice was biased and was arguing his case, whereas the witness Phoebus appeared to me to be as completely impartial as anybody I have ever seen on the witness stand. As a matter of fact, I think that the witness Phoebus was to be congratulated for the manner of giving his testimony because he was frank and candid and completely impartial.

Mr. Strong: I just want to state for the record that Mr. Eustice has not testified in any proceedings and that what your Honor may consider as bias was simply an attempt on his part to answer the questions as asked him, which were very often quite lengthy and involved.

The Court: He is used to arguing across the table to some other accountant, probably.

Do you want a specific exception on that?

Mr. Kosdon: Yes.

The Court: That will be X-3. [1371]

Mr. Kosdon: I think there was evidence in the record particularly with respect to Mr. Bircher who did recite some things which indicated there was some partiality as far as Mr. Bircher was concerned.

The Court: I think my general instruction that they should give no greater weight just because they are an officer of the United States than any other person is sufficient.

The next one, the law relative to the declaration of estimated tax, well, now, there isn't any. While there is evidence in the case here that he filed an estimation of the tax return, the government isn't

basing any of its charge upon the fact that those estimates were wrong. It is based on the fact that he just didn't report it in his final report.

Mr. Robnett: Yes, but I answer that by saying there might be some argument and we ought to have an instruction on that. There might be some argument from the prosecution that the estimate was small the first of the year and it increased as the year went on. That is a fact as shown by how the payments were made.

Mr. Kosdon: The law provides that if you have a tax of a dollar in the year 1945 and earn a million dollars in 1946 all you have to do is file an estimate based on your net income of 1945 irrespective of what the earnings may be the following year.

The Court: I suppose in view of the fact there was some [1372] evidence in there that the jury might take into consideration as either evidence of his wrongdoing or of his wilfulness, for that reason the instruction had better be given.

Mr. Strong: I assume we will discuss them again?

The Court: Yes.

The next one on general reputation is one that is already in. I think one instruction on that is sufficient.

The next one—well, I will lay it aside. We will get to that one again.

The next one, willfully and knowingly, that will be covered.

The next one, that the defendant did actually defraud the government, that is not the charge.

Mr. Kosdon: I believe that is the law, your Honor.

The Court: Of course even if there were, this is a loaded instruction. It says that if such tax was not paid by such defendant without saying when it was not paid.

The Court: The indictment reads, "knowingly, unlawfully and feloniously attempt to defeat and evade." This is an attempt, it is not a charge that he actually did defraud the government, so that will be out.

Do you want a special exception on that?

Mr. Robnett: Yes.

The Court: That will be X-4. State your objection for the record. [1373]

Mr. Kosdon: We wish to take exception to the ruling as to instruction X-4 for the reason that we deem the law to be that there is no attempt to willfully evade any tax if the tax is paid prior to the filing of the return of the indictment.

The Court: The next one is on the subject of willfulness, which will be covered.

The next one, under-estimating, that is covered by the other proposed instruction which you gave, if I give it, so this is merely a duplicate of it.

The next one goes to the question of willfulness.

The next one also is on the question of willfulness.

This one I will lay aside, about the source of income.

Now on this other one about the fiscal year, the government has one which I thought we might work over, so I will lay that aside to be covered. I will give that a number, however, X-5.

Mr. Kosdon: I think Mr. Katz has one, too.

The Court: The next one is a duplication, and it is covered by reasonable doubt and willfulness.

The next one, at the time this indictment was returned on January 22nd a tax in addition to the tax already paid was due and unpaid, I do not think that is the law.

Mr. Robnett: There is one case, the Schenck case, which I believe held that the government must show there was a tax unpaid. [1374]

Mr. Strong: On the date that we charged.

The Court: On the date it was due but not on the date the indictment was returned.

Mr. Robnett: The language doesn't say as to what date.

The Court: I think it is the date due. I will give this a number, X-6. Will you state your objection for the record?

Mr. Robnett: We except to the ruling of the Court for the reason that our construction of the law following the case of United States v. Schenck, 126 F. (2d) 702, means that before a charge of willful evasion can be brought against a defendant the tax must be due and owing at the time the indictment is returned.

The Court: Your next instruction.

Mr. Kosdon: I think that takes in the fiscal year too.

The Court: Yes, that is the fiscal year and that will be covered. I will give a number on that, X-7, and your exceptions will be the same as that which you stated for X-5.

Mr. Kosdon: Yes, your Honor.

The Court: I will lay that aside.

The next one goes to the question of willfulness again and will be covered.

Presumption of innocence is the next one. That will be covered by the general instruction. [1375]

Certain offered evidence might be properly admitted, that is covered by a general instruction. Any statement of counsel, that is covered by a general instruction.

The next one, the presumption of speaking the truth, that is covered.

The opinion, that is covered.

Failure of a defendant to testify, that is covered by the instruction that I will give.

Mr. Robnett: We wouldn't now offer it.

The Court: The next one, we are not concerned with that here.

Mr. Kosdon: That is taken from the Spies case, which is a criminal case, I believe.

Mr. Strong: That wasn't an instruction in the Spies case, that is one of the obiter dicta of the court.

The Court: I do not think that would be proper. Do you want it numbered X-8?

Mr. Robnett: Yes.

The Court: And you except to the giving of

instruction X-8 as the law and that I am not covering it?

Mr. Robnett: That is correct.

The Court: The other one is covered.

Mr. Katz: I take it that your Honor is going to go over all of these again. I have in mind this, if the Court please, the general instruction with regard to willfulness does not [1376] cover the specific matters of the things done as a result of ignorance, mistake, carelessness, negligence, which the cases hold is a defense, and it is my thought that in addition to a general instruction as to what willfulness means that there should be a specific instruction to the effect that acts done as a result of ignorance, mistake, carelessness, negligence, do not constitute an offense.

The Court: I think that instruction on willfulness covers that and I have hammered that out after a lot of argument with different government counsel and defense lawyers, and I have not had a final exception taken to it, but I do not mean to say that they know any more about it than you people do or that I couldn't be wrong. But I have given it so many times that I am satisfied that that covers all the phases that must be taken into consideration as to willfulness.

Mr. Robnett: There were three instructions I noticed here of those that we had—they don't have numbers—two of them particularly that you said would be covered by the instruction on willfulness.

These are the ones, "failure of a taxpayer to report income which he honestly believed was not

taxable does not constitute a willful violation of the Internal Revenue Code”; “failing to account and pay income tax in the proper year, and paying and accounting for the same in a different year by the taxpayer, and under his honest belief that that is when it is [1377] due does not constitute a violation of the Internal Revenue Code.”

I do not believe that those would be covered by the general willfulness instruction.

Mr. Strong: There is no evidence as to that.

Mr. Robnett: Oh, yes, there certainly is. That is one of the arguments. You claim that they should have accounted for it in 1944 and we claim they should have accounted for it in 1945.

Mr. Strong: It may be argument but it is not evidence.

Mr. Robnett: There is plenty of evidence to infer by the fact that they did so account.

The Court: I believe those are covered by the general statement on willfulness.

Mr. Robnett: May we have a special exception?

The Court: Are they numbered?

Mr. Robnett: No, they are not.

The Court: We will mark them X-8 and X-9.

Mr. Robnett: Then also here is one which you claim was covered—I don’t know—“An underestimate of one’s income does not constitute a violation of the Internal Revenue Code, unless such underestimate was willful and intentional.”

The Court: You have another instruction in here on estimates.

Mr. Robnett: I see. All right. [1378]

The Court: It would seem to me that that was a duplicate of your other instruction, which I will determine whether we should give or not.

Mr. Robnett: As to X-8 and X-9, the exception is that they properly state the law and the facts in the case warrant the giving of them, and that they should be given, and they are not covered by any other instruction.

The Court: Very well.

Let me see now. The general plan will be for me to read the general instructions and then come to the charges in the case.

Government's instructions 3 and 4 are out because those counts are out.

Mr. Strong: Do I get exceptions too?

The Court: Surely. [1379]

The Court: Your 14 and 15 also relate to Counts 3 and 4.

Mr. Katz: With respect to Government's instructions——

The Court: Wait until your client gets here.

Mr. Katz: I am sorry. I didn't notice that he had stepped out.

With respect, if the Court please, to Government's instructions, there are two instructions that I wish to call to your Honor's attention with respect to which, if they are going to be given, I wish to note an exception.

The Court: Let us take them one by one.

Mr. Katz: I thought you had gone through them?

The Court: No. I now pull Government's instructions 1 and 2, and go first to Government's instruction No. 5, line 6.

“Failure to collect and pay over tax, or attempt to defeat or evade tax.”

That is the title of the section. That is stricken out. I will read the section, except line 14 I will strike out the punishment, so it will read, line 13:

“upon conviction thereof, shall be punished in the manner provided by law. You are not to be concerned with such punishment, as that is a matter that lies solely within the province, and is the responsibility of the Judge.”

Mr. Katz: If your Honor please, inasmuch as this case is not one having anything to do with failure to collect—— [1380]

The Court: “Any person required under this chapter to collect,”—I have it stricken out. It will read:

“Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall be guilty of a felony.”

Mr. Strong: If you take that word out, then where on line 5 it says: “The precise wording of the statute follows:” should say, “The precise wording of the statute applicable to this case.”

The Court: "The precise wording of the statute provides."

Mr. Strong: "As applicable to this case." Does Mr. Robnett join in that objection?

Mr. Robnett: Yes.

The Court: "The pertinent portion of the statute provides:"

Mr. Strong: Is it understood, your Honor, unless Mr. Robnett indicates otherwise, he is joining in the objection?

Mr. Robnett: Yes.

The Court: What objection?

Mr. Strong: Whatever exception is made by Mr. Katz.

The Court: Or vice versa.

Mr. Strong: Or vice versa. [1381]

The Court: The next question.

"The charge against each of the defendants in each of the Counts contain in the main two elements. First, whether the defendant named in each of the Counts as owing a tax, did in fact owe more tax than he reported, and second, whether in each instance there was a wilful intent by him to evade and defeat any part of such tax by the filing of the false return."

Then I thought I would give Government's 1 and 2.

Mr. Robnett: As to the one your Honor is considering, as to the paragraph on the second page——

Mr. Katz: Are you turning the page now on No. 5?

The Court: No. I am not turning the page. In

other words, at line 22, I will jump from there to Government's 1 and 2. In other words, I read the law, state the charge, and then give an analysis of it.

Mr. Robnett: I want to except, on 5, to that portion of it starting at line 17 down to and including line 22, upon the ground that it is ambiguous and it indicates the charge against each of the defendants, in each of the Counts, in the plural.

The Court: That is correct.

Mr. Robnett: I think they should be named, and the number of the Count against each one should be specified. In other words, the charge against Sam Ormont is in Count 1 only. [1382]

The Court: I state that, in Government's 1. What I am trying to do here is to break this down. We will go to Government's No. 1. Have you got Government's No. 1?

Mr. Robnett: Yes, I have.

Mr. Strong: If your Honor gives part of Government's 1 in there, I would not ask for the portion running from line 17 to line 22. That was solely preliminary, for the jury.

The Court: I have got to give an instruction that there are two elements to the offense: Did they do what they are charged with doing in the indictment? If they find beyond a reasonable doubt that the defendant did that, they must consider whether or not, beyond a reasonable doubt, they did that wilfully. If they don't find either one was done wilfully, was not done beyond a reasonable doubt, they must acquit. So it has to be stated in shorter terms.

Mr. Strong: I am satisfied with the way it is.

Mr. Katz: Lines 17 to 22, "whether in each instance there was a wilful intent by him to evade and defeat any part of such tax by the filing of a false return," which is practically an assumption or statement that a false return had been filed, and it is a question of intent. It should be set up on the basis of whether there was a false return filed, and whether such return, if false, was wilfully done.

Mr. Strong: The first part of the sentence relates to the return. [1383]

Mr. Katz: No, it relates to the tax.

The Court: Let us go to Government's 1.

Mr. Strong: Might I indicate, lines 23 to 25, those are only for the Court, and are not to be given as part of the instructions.

Mr. Robnett: What is that?

The Court: It is a footnote to me. I will read from 1 to line 16, followed by 5, and then go to 1.

Mr. Robnett: Now you are going back to 1, after reading the statute, is that correct?

The Court: Yes.

Mr. Robnett: As to 1 I want to make this objection, and take this exception to it, particularly to the portion on page 2, where it says: "Also, as to Count one, I want to call to your attention the fact that it refers to an income and Victory tax return, and that since there was no Victory tax payable for the year 1944, the words 'Victory tax' are surplusage, and may be disregarded by you."

I except to that upon the ground that it should not be given; it is included in one part of the charge

in the indictment, and the defendants are here to meet the charge as made in Count 1, and that charge as made is that that was what they did; that the defendants filed a false, and fraudulent income and Victory tax return. There is no charge in there that he did something else; only that. That portion of that [1384] instruction should not be given.

The Court: I think it should be given.

Mr. Robnett: We take our exception.

The Court: Very well, exception may be noted to that.

Mr. Robnett: The exception goes to the fact that there is a variance, and by giving that instruction it violates the variance.

On page 1 of the instructions, line 23, they use the expression: "there was a substantial sum of money which the defendant received as income, and which was taxable during that year."

I think that is not the law. It was merely a substantial sum of money, on the ground that the cases hold that the proof must show that he evaded a substantial part of his tax. There is one case where the man, it was shown, did not report \$10,000, and they held in that case that that was not sufficient proof, because it showed he had an income of a million dollars; and yet, to this jury, maybe \$10 would be substantial, or any sum of that sort.

The Court: I think it might better be changed: "It is sufficient if the Government proves that in addition to the income which the defendant himself reported in his income tax return, there was a substantial sum of money which the defendant received

as income,”—say “The defendant received as income substantially the sum alleged as taxable income during [1385] that year.” In other words, if it is a trifling sum, “a sum substantially the sum alleged.” I will strike out “there was a substantial sum of money.” It will read: “It is sufficient if the Government proves that in addition to the income which the defendant himself reported on his income tax return, the defendant Ormont received as income substantially the sum alleged as taxable income during 1944.”

Mr. Strong: Suppose it was alleged that he received as income an additional million dollars, and we prove a thousand dollars, it would be substantial.

The Court: Insofar as this case is concerned, there is not that variance. Either the defendant received the amount alleged, or substantially that sum, or he didn't receive any sum. He either got it or he didn't during that year.

In other words, on line 26 I strike out, “Even if the Government were to establish only that the defendant Ormont met taxable income was substantially in excess of \$12,174.57, which he reported, it would be sufficient proof as to that count.”

I think I can strike that sentence out. It is repetitious as well.

Mr. Robnett: It wouldn't be consistent.

The Court: Otherwise I think that instruction No. 1 fully and fairly states the charge of Count 1.

Mr. Robnett: Yes, I believe so. [1386]

The Court: Then I will go to Government's proposed instruction 2.

Mr. Robnett: 2 and 3 are out, because of the Counts being out.

The Court: No, Instruction 2 relates to Himmelfarb.

Mr. Robnett: I am sorry, your Honor.

The Court: Strike out "and the succeeding Counts in the indictment, it is not necessary for the Government to establish that the true net income of the defendant was the precise sum which it alleges in the indictment, and it is enough for the purposes of this case if the Government establishes that the true taxable income of the defendant Himmelfarb for the year 1944 was a substantial sum in excess of that which he reported in his return."

Mr. Robnett: The words stricken out on line 22 were what?

The Court: "and the succeeding Counts in the indictment."

Mr. Robnett: "as well as Count 1" should be stricken,—the preceding words.

The Court: No.

Mr. Katz: It should be "as in Count 1."

The Court: "as in Count 1." I will strike out, and say "Again as to this Count,"—we will go back to 5, line 17: "The charge against each of the defendants in each of the Counts contains in the main two elements."

Mr. Robnett: Mr. Strong suggested leaving that out, if [1387] you put in one.

Mr. Strong: I changed my mind.

The Court: "This the charge against each defendant in the applicable count consists of two elements: First, whether the defendant named in the Count." Strike out "as owing a tax."

Mr. Robnett: They are both named in each of those Counts.

The Court: They are out.

Mr. Robnett: They are actually on the face of the indictment named though. I think if we strike it, specifying Ormont as to Count 1——

The Court: Whether the defendant Ormont, as to Count 1, and the defendant Himmelfarb, as to Count 2, did, in fact do the things charged, and, second, whether in each instance he did——

That paragraph would read now: "Thus," and it will follow instructions 1 and 2, as I have indicated: "Thus the charge against each of the defendants in the applicable Counts consist of two elements: First, whether the defendant Ormont, as to Count 1, and the defendant Himmelfarb, as to Count 2, did, in fact, do the things charged, beyond a reasonable doubt, and if so, whether in each instance, if he did them, in each instance beyond a reasonable doubt, he did them wilfully, as that term will be defined to you."

Mr. Robnett: The rest of it is out? [1388]

The Court: Yes, without repeating all of these things in the indictment did he do it, and did he do it wilfully?

Mr. Katz: If the Court please, doesn't that leave out one element in this respect: Let us assume that the defendant attempted to evade his income tax,

but doesn't do it wilfully. Let us assume at the time he attempts so to do and does such wilfully, when in fact he owes no tax——

The Court: He can't attempt to do anything wilfully if he doesn't owe any tax.

Mr. Robnett: I think that is covered by another instruction.

The Court: Because whether or not the defendant did, in fact, do the things charged, that is the attempt.

Mr. Katz: I think it is probably good. [1389]

The Court: All right. Now Instruction No. 5——

Mr. Strong: Do you define wilfully at this point?

The Court: No, I will define this later.

Mr. Strong: Because all this in effect follows and discusses what wilfully is after you define it.

Mr. Robnett: I think the balance of that is covered by your wilfullness instruction.

The Court: I do not want to give any illustrations.

Mr. Strong: You can tell them to disregard your comments.

The Court: I know, but I tried a case before Judge Cosgrave as District Attorney and he illustrated everything and there was a reversal on the case just because of his illustrations.

Mr. Strong: May I argue illustrations? Any objection to that?

The Court: That is argument, that is not instructions.

Mr. Katz: That part is out then, starting with line 26?

The Court: And that from line 6 to 11 is repetition, on page 2, so that will be out.

Mr. Strong: How about lines 2 to 5? There is testimony here as to the defendant Ormont saying various things.

The Court: I think that that could better be covered by the proffered instruction of the defendant about other offenses. [1390]

Mr. Strong: All right.

The Court: Now your No. 6.

Mr. Katz: No. 6 does not appear to be a correct statement of the law, if the Court please.

Mr. Strong: It is taken from another case which was upheld, and certiorari denied.

Mr. Robnett: Not as to income.

Mr. Strong: It was an income tax case.

Mr. Robnett: Not in this circuit.

Mr. Katz: It does not appear to be a correct statement of the law.

Mr. Strong: If the defendants don't want any instruction on avoidance versus evasion, that is satisfactory to me.

Mr. Katz: Instruction No. 6 uses the word "avoid" which was specifically held, I believe, in the Nickala case, to be proper provided it is not done by unlawful means.

Mr. Strong: That is all this says, your Honor.

Mr. Katz: To use a device or strategy to avoid a tax if not by unlawful means is perfectly proper

and the Nickala case, if I recall it, is a case that goes into that matter.

The Court: What is your instruction on avoidance? Where is that here? I saw one here that looked pretty good.

Mr. Katz: I think I submitted one on the matter of avoidance. My Instruction No. 43 goes to that.

The Court: I can take that and modify it.

Mr. Katz: No. 40 is a general instruction on that phase, too.

The Court: I passed that up.

Mr. Katz: That No. 40, if the Court please, is the one that goes into the matter.

Mr. Strong: That is not the law, your Honor.

The Court: Here is the Nickala case: "You are instructed that every person may use all lawful means to avoid the payment of income taxes and that the avoidance of income tax by any lawful means does not constitute a criminal offense. It is an offense, however, to wilfully evade or attempt to evade the payment of such taxes."

Now I think the word "evade" should be defined. I think I can use the word "avoid" there in view of what I have just stated, "to avoid by artifice."

Mr. Katz: The addition "to avoid by artifice," yes, but just to avoid without anything further I do not believe is proper.

The Court: The first sentence can come out here. "Evasion means you avoid by some device or strategy or concealment or intentional withholding some

fact which ought, in good faith, to be communicated."

Mr. Katz: Are you on No. 6 now?

The Court: Yes.

Mr. Katz: How does your read? [1392]

The Court: This is the second sentence.

Mr. Katz: Oh, you have eliminated the first. All right.

That is in the disjunctive, "by some device or strategy or concealment or intentional withholding."

With respect to the matter of device or strategy, if it is a lawful device, such as the organization of a corporation or the establishment of a partnership, general or limited, or if it is such a strategy——

The Court: I can straighten this out here.

Mr. Katz: It must be an unlawful device or unlawful strategy.

The Court: "Ought to be in good faith calculated to wilfully reduce his income tax."

Mr. Kosdon: That wouldn't necessarily follow unless the device or strategy was unlawful because most shifts from partnerships to corporations are wilfully done for the purpose of reducing one's taxes. It is intentionally done, but it is lawfully done.

Mr. Katz: As a matter of fact, a partnership will organize a corporation to operate as such to create a new fiscal period for the purpose of getting a lower tax, which is lawful and proper.

Mr. Strong: The motion picture people just did it and there is some grave doubt as to its lawfulness.

Mr. Katz: That situation is one where for each picture [1393] they organized a separate corporation. That isn't the same as where a partnership changes and they actually form a corporation and proceed to operate as such, or where a corporation or some individual may be interested in a corporation or partnership.

The Court: I think the whole matter can be covered by leaving your Instruction No. 43 but terminating it at line 7 after the word "taxes." The rest of it is the usual kicker on there which I do not give.

Do you see what I mean? Strike out the last sentence and I will not give No. 6.

Mr. Katz: Very well.

The Court: I think that covers it.

Now No. 7.

Mr. Strong: Don't you have a general instruction on that?

The Court: Yes.

Mr. Kosdon: Then 7 will be out?

The Court: It is covered I think by my general instruction.

Mr. Katz: No. 8 is objectionable.

The Court: Aider or abetter. There isn't any aiding or abetting here.

Mr. Strong: Both filed a 1945 fiscal year return, both used the same accountant, the same law-

yer and filed almost [1394] precisely the same letters.

The Court: I know, but if they were both charged in each count this would be all right but now they are separately charged.

Mr. Strong: All right.

The Court: That is out then.

Now No. 9 touches the question which has perplexed me a little.

Mr. Katz: That is objectionable, your Honor, in part at least.

The Court: What is your instruction on that about the fiscal year?

By the way, I think maybe the defendant Himmelfarb's No. 7 might well follow the one about avoidance and evasion.

Mr. Strong: I have no objection.

The Court: Your Instruction No. 31 and 32, that is, Himmelfarb's 31 and 32, I have here. Let me see what Ormont had to say about that.

Mr. Katz: No. 31 I think is similar to theirs. Which one of those two are you giving?

The Court: What I am looking for now is the defendant Ormont's proposed instructions on the same motion so that I can get your three instructions together here.

Mr. Katz: I have a slight objection to Mr. Ormont's instruction as being incorrectly worded.

The Court: By the way, here is one of the defendant Ormont's instructions that I think I can give following this other one. It is a negative instruction. "You are instructed if you find from

the evidence that the defendant Sam Ormont may be guilty of any other crime or wrongdoing not connected with the offense of willfully, knowingly, unlawfully and feloniously attempting to defeat and evade a large part of the income tax due and owing by said Sam Ormont to the United States for the year set forth, that in that event you cannot and must not take into consideration any different or other offense or offenses than that the defendant may have committed. You must find the defendant not guilty unless you find from the evidence beyond a reasonable doubt"—well, that is a kicker. But up to that point I think that that ought to be given. And instead of just "Ormont" it should read, "if you find from the evidence that the defendants or either of them may be guilty of any other crime."

Mr. Katz: I hadn't submitted such an instruction for the reason that the record is free as to Himmelfarb of any of the evidence indicating any other crime. Of course I am faced with the proposition that they may consider it.

The Court: I think it had better be given then.

Mr. Strong: I think the last part of the instruction should read, however, that you may take that into account in determining whether they willfully acted as charged. [1396]

Mr. Katz: That I would be opposed to because then it assumes that there is some evidence as against Himmelfarb on that issue.

Mr. Strong: Or you can add a comma at the

end of the sentence and say, "except with reference to the element of willfulness."

The Court: I think that is correct. Adding to line 11, "except as to the element of willfulness with relation to the charge in this case only," and leaving in your kicker in this case because it points up the proposition that they are only trying them in this case.

Very well. That will be given as modified.

Now I believe I have segregated the three proposals here with relation to books. I think I can give Himmelfarb's No. 32 first in this connection.

Mr. Strong: That is all right.

The Court: I thought I had Ormont's instruction on the books here, but I do not find it.

Mr. Kosdon: Is this it?

The Court: "Books need not be formal!"

Mr. Kosdon: Yes.

The Court: What I was trying to get at was the subject matter of Government's Exhibit No. 9.

Mr. Kosdon: This is the one, I think.

Mr. Strong: These two I think deal with the fiscal year. [1397]

Mr. Katz: No. 31 deals with the fiscal year period on Himmelfarb but it doesn't go into the matter of books or records.

The Court: It is X-5.

Mr. Katz: I think that X-5 corresponds to Himmelfarb's No. 31.

The Court: I have that. It is the same thing?

Mr. Katz: Yes.

The Court: It is identical?

Mr. KATZ: Now there is a change. May I point out what I deem to be an error in X-5 which I tried to correct in mine?

The Court: Before you go to X-5, have you Himmelfarb's Vol. 12?

Mr. Strong: Yes.

The Court: I will give that as the opening stanza on this.

Mr. KATZ: Now on X-5, getting down to the last line: "persons constituting such partnership or joint venture are not required to pay for the income of such partnership or joint venture until the 15th day of March of the calendar year following the last day of such fiscal year period." That is incorrect. It is the 15th day of March of the calendar year following the calendar year in which the fiscal period ends. [1934]

In other words, if the fiscal period ends on September 1, 1945, it is payable on March 15 of the calendar year following the calendar year 1945, or 1946.

I believe I corrected that by stating it that way, that it is in the calendar year following the calendar year in which the fiscal return was made. That is correct, I believe.

Mr. KATZ: Yes. We had two instructions on that matter which covered the matter as to which year it was to be paid in but specifically setting forth the date when it would be due.

Mr. Strong: We object to X-5, your Honor. First of all, it doesn't state the full substance of what is in issue. Secondly, the way it is phrased they

may just elect. It disregards the fact that there are certain requirements which precede such an election or choice. One of them is the keeping of books and records of a certain type and that they cannot elect in the event they do not keep them.

The Court: Let me see. Your instruction struck me as a little bit awkward. I mean it gets down to the point finally but I think it is confusing to the jury. In other words, they determine whether the Acme Meat Company and whether the additional \$71,000 was actually received by them as part of the transactions carried on as the Acme Meat Company. Well, I don't know, I think probably that is in the case.

Mr. Strong: That is the main question. [1399]

Mr. Katz: There is this objection to No. 9, if the Court please, which I have. First, starting at line 8, "In this connection you may take into account the evidence which is in the record which tends to show where the \$71,000 came from." There is no such evidence in the record as against the defendant Himmelfarb.

Then "what enterprises if any the defendants engaged in besides the operations shown as the Acme Meat Company," there is no evidence in the record that the defendant Himmelfarb——

The Court: Yes, there is.

Mr. Katz: As to what?

The Court: If nothing else, there is the joint return and then there is the testimony from Ormont, his statements to the agent about where he got it, so while that testimony is not applicable to

Himmelfarb the jury can draw an inference from where the testimony shows that Ormont got that Himmelfarb got it from the same place.

Mr. Katz: I don't understand, if the Court please, that evidence that is in the record solely and exclusively against Ormont can be used in the determination of Himmelfarb's case as to what the evidence is in his case. [1400]

The Court: They were doing business together. They did file the joint return. There is clear, positive evidence of that.

Mr. Katz: There was a joint return.

The Court: That is a proven fact.

Mr. Katz: Yes.

The Court: There is evidence in the record, as to Sam Ormont, as to what he was. There isn't anything directly against Himmelfarb, but the jury can certainly draw the inference.

Mr. Katz: Not by going into the evidence against Ormont.

The Court: I think they can, from the testimony of Sam Ormont, as to the source of that income, because it is a proven fact. And they can, from that fact, by virtue of the other proven facts, that they signed a joint return, in fact, that it came from some source. The first proven fact is the joint return.

Mr. Katz: The next one we referred to, if they accept as a proven fact what Ormont got.

The Court: On the joint return it says they are doing business as Acme Meat Company.

Mr. Katz: No reference to the Acme Meat Company.

Mr. Strong: It doesn't say Acme Meat Company. It says: "Miscellaneous Enterprises together." There is another point, your Honor, which is mentioned, that both defendants went to [1401] the same lawyer; he filed the return, and went to the same accountant.

The Court: There is evidence that the defendant Himmelfarb was at the plant when they went down to interview him before the expiration of the fiscal year. There is testimony of some witness that he saw Himmelfarb down there.

Mr. Katz: Let us go back to Instruction No. 9.

The Court: No. 31, down to the first sentence, is a more correct statement than 45.

Mr. Katz: Yes.

The Court: So I will get rid of X-5. I think, therefore, on your No. 31, I can give the instruction down to the sentence on line 12. From there on I think the Government instructions should be given, No. 9.

Mr. Katz: If the Court please, I have not completed my objections to No. 9.

The Court: All right.

Mr. Katz: It refers to taking into account of evidence which is stated as a matter of fact, in this, that it is in the record, and that the defendants engaged in, besides the operation, known as the Acme Meat Company. There isn't any evidence in the record as against the defendant Himmelfarb

that he engaged in the business of the Acme Meat Company.

Mr. Strong: It shows that he was a partner.

The Court: Yes, there is testimony that they held [1402] themselves out as partners. There is the insurance policy.

Mr. Katz: There is the insurance policy, that's right. There is also testimony from Mr. Link, the only evidence applicable, by Link.

The Court: It is to your own advantage if he was doing business as Acme Meat Company. The Acme Meat Company kept records.

Let me see. "In this connection it is a part of your functions to decide whether the defendants actually had some income producing enterprise, or enterprises,"—I think that sentence can be cut out.

Mr. Strong: It is our position that they did not have any separate enterprises.

The Court: Lines 5 to 8.

Mr. Strong: They had some income producing enterprise, which they reported on a fiscal year basis. That refers to what there was reported. It says: Miscellaneous enterprises. That was reported separate and apart.

The Court: "what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company," that assumes they did engage in an operation known as the Acme Meat Company.

Mr. Strong: The evidence shows it.

The Court: The jury has got to decide this.

Mr. Katz: That was my objection. [1403]

The Court: "what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company,"—before they decide they were engaged together in the Acme Meat Company they must decide not only then whether they in fact received it, and whether they kept books on that transaction.

They decide whether or not they did engage in this enterprise, but the turning point is whether or not they kept books as required by the statute, so as to permit them to file.

Mr. Kosdon: I don't believe 145 (b) makes it an offense.

The Court: I am not concerned whether it makes it an offense to keep books, or not to keep books; but it is material here, because if it was an enterprise other than the Acme Meat Company, then, in order for the law to determine whether they could or could not file on a fiscal year basis—that is determined by whether or not they kept books; and if they did not keep books, they were not entitled to file on a fiscal year basis. If they did keep books on that extra enterprise, then they were entitled to file on a fiscal year basis.

Mr. Katz: I think this last instruction, as it is being modified by your Honor, will require the giving of the instructions that I have requested, that if the election of the fiscal year was done through error, ignorance of the law, misunderstanding, then they would not be guilty of an offense.

The Court: Here will be the instruction then: I will give 32. We have settled that on the joint venture, or [1404] partnership. Then the first sentence of 31. Then the Government's No. 9, as modified, and then Government's No. 10. I will give Government's No. 9, and then your instruction in regard to the books.

Mr. Robnett: I want all of that.

The Court: You want the whole instruction?

Mr. Robnett: Yes.

The Court: Then the Government's No. 10.

Mr. Katz: In connection with No. 9, I want to know whether 33 should not be given by reason of the modification in No. 9, and Himmelfarb's No. 33.

The Court: What is that?

Mr. Katz: I am asking the Court now to consider Himmelfarb's No. 33, in view of the modification.

The Court: I will add one other modification to No. 9. I have added, after line 21, the following: "and if not, then whether or not books and records were kept of such other enterprise as required by the statute, and in this connection I now instruct you that the law relating to such, and such books need not be filed. Then Government's No. 9.

Mr. Robnett: That is the only modification of 9, is it?

The Court: No, on line 12, after "Acme Meat Company,"—"if you decide they were engaged together in the Acme Meat Company."

Mr. Robnett: Your Honor, it seems to me that 9 is a [1405] confusion instruction.

The Court: That is what I thought about it at first.

Mr. Robnett: Starting with line 8 you tell them **they may consider this in connection**—"you may take into account the evidence which is in the record which tends to show where that \$71,000.00 came from, what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company."

The Court: If you decide they were engaged together in the Acme Meat Company.

Mr. Robnett: "and whether the additional \$71,000.00 was actually received by them as part of the transactions carried on as the Acme Meat Company, or whether the money was received as income with reference to some other transaction not part of the Acme Meat Company."

I think it is putting a negative in there, practically requiring us to prove a negative, namely, that we must prove that it was not from the Acme Meat Company, and was not a part of the Acme Meat Company, whereas the burden of proof is upon the Government to prove that it was not a joint venture.

The Court: No, the Government's position is that it was a joint venture, but it was not one which they could use a fiscal year basis on.

Mr. Robnett: That would be because of lack of books.

The Court: The Government accepted it, I understand. [1406]

Mr. Strong: No.

The Court: You don't accept the fact that it was a joint venture?

Mr. Robnett: I want to make an exception to the giving of any part of No. 9, on the ground that it is confusing, and that it is pointing out evidence by saying it tends to prove given things, that are not proven, and it tells the jury there is evidence in the record that tends to prove those things. Particularly, as to the \$71,000.00, as to where it came from, and that it puts the burden upon the defendant to show a separate enterprise from the Acme Meat Company, whereas there is a serious question of whether these two defendants were engaged as the Acme Meat Company.

The proof would tend the other way, that they were not; and Mr. Himmelfarb was merely an employee of the Acme Meat Company, and was not engaged in its operation, or getting income, that is, part of the Acme Meat Company's income. He was being paid a salary. And it is confusing from that point of view.

The Court: I don't think so. If it were I would agree with you, but I think with the changes I have made, that that is a question for the jury.

Mr. Katz: May I say, with respect to the defendant Himmelfarb, that the manner in which the statement here is made, as to what the evidence tends to prove, being a statement [1407] by the Court in the instruction, the net result is that the inference is as indicated, or may be so drawn.

The Court: If I thought that were true, I would not give it, but reading the instruction, I don't see it.

The Court: That is what I thought about it at first.

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The Court: If I thought that were true, I would not give it, but reading the instruction, I don't see it.

Mr. Katz: Don't you do that, when you say, "In this connection you may take into account the evidence which is in the record which tends to show where the \$71,000 came from?"

Mr. Strong: May I make this suggestion?

The Court: Yes.

Mr. Strong: "May take into account whatever evidence may be in the record which tends to show."

The Court: "May take into account the evidence which is in the record concerning." Strike out "which tends to show."

Mr. Robnett: Isn't that pointing out to the jury some specific kind and character of evidence, whereas, in truth and in fact, they should not be told about that, because they are, under one instruction told that they must follow the law, and that they must try the case solely on the evidence. Here you are pointing out the evidence in a specific case, which emphasizes it.

Mr. Strong: It refers to the fiscal return.

Mr. Robnett: It goes much further than that, if your Honor please. It indicates that the Acme Meat Company had sales and operations, and that is not defined. It would indicate they might have had income from things besides sales. I [1408] think that it goes into something which brings the Acme Meat Company into this, in the instruction.

Mr. Strong: It is in the case already.

Mr. Robnett: There is evidence that there is an Acme Meat Company. You say, if they were engaged in anything besides the Acme Meat Company.

The Court: "In this case you must determine what enterprises, if any, the defendants were engaged in, besides the operation known as the Acme Meat Company, if you decide they were engaged together, and whether—" I strike out line 9. It will read "In this connection you must determine what enterprise, if any, it came from, and whether the \$71,000.00 reported on that return was received by them as part of the transactions carried on as the Acme Meat Company." I think with that modification it will stand. [1409]

The Court: Very well. We will go to the next one now, No. 11. I think that is covered.

Concealment of facts, that is too argumentative, I think, Mr. Strong. That is No. 12.

Mr. Katz: No. 11 is out?

The Court: Yes.

I think your No. 12, the last sentence is the only thing that should go in. "In order for you to find that sums received by the defendants during any of the taxable years constituted income to them, it is not necessary for the government to prove the exact source of that income."

Mr. Strong: I did not understand the defendants were objecting to No. 12.

Mr. Robnett: Yes, we just reached it.

Mr. Strong: All right.

Mr. Katz: Now with respect to 12, what is in it?

The Court: The last paragraph: "In order for you to find that sums received by the defendants during any of the taxable years constituted income

to them, it is not necessary for the government to prove the exact source of that income."

Mr. Katz: What is that, out?

The Court: That is in, but the rest of it is out.

Mr. Katz: We only have one taxable year here.

The Court: That is right, one year. During that taxable year 1944. [1410]

Mr. Katz: Now there is one other thing. "In order for you to find that the sums received by the defendants during the taxable year constituted income to them," that is true——

Mr. Strong: To each of them.

The Court: Very well. 12(a), that is out.

Mr. Strong: That is the reverse. It has the reverse on the bottom there. I think you gave such an instruction in the last jury case that I tried before your Honor.

The Court: I have one general instruction that I give, after all reasonable doubt if they find on the other hand that they are guilty beyond a reasonable doubt then it is their duty to find a verdict for the government.

Now as to the defendant Ormont taking the witness stand, I have the one instruction where a defendant takes the stand and is entitled to a general instruction, which I think covers that.

No. 13 is out.

Now let us take the other instructions of the defendants. On Ormont's instruction, "You are instructed that a taxpayer on a cash basis need not report any income on his return that may be due

him until he actually receives the case," I do not see what that has to do with this case.

Mr. Strong: That is as to 1943 anyway.

Mr. Kosdon: There was evidence in the case that some of the money paid in 1944 wasn't paid instantly, you might [1411] say, but was paid some time later. Some of these people came back and paid later.

Mr. Strong: We don't charge the defendant with that.

Mr. Robnett: Yes, you do. At this point your Honor let the evidence in as to all those years for the purpose of showing intent, that is, to show intent to violate.

The Court: All right. He receives it when he gets it in the bank. I do not think it is necessary to define receives. It is when he has dominion or control over it.

Mr. Strong: Your Honor, if I may suggest, there was quite some discussion and your Honor might have indicated by the rulings that there would be some doubt as to whether he receives it when he gets it actually or when it is deposited in his bank or to his account with Merrill, Lynch, Pierce, Fenner & Beane.

The Court: I have several thoughts in that connection. Every lawyer, for instance, unless they have a bookkeeper to keep track of things, gets large sums of money and instead of opening it to the client's trust account or part fees or part costs, and so forth, they will put it through their own account, but a lot of that is the client's money.

Mr. Strong: I will argue that point so it won't be necessary to give it.

The Court: Because money is deposited in a bank doesn't mean it belongs to them. [1412]

Then the next one, the law presumes the acts of all men have been properly performed.

Mr. Strong: I thought there was a presumption of innocence but I didn't know there was a presumption that attaches legality to any act.

Mr. Katz: There is such a presumption.

The Court: Yes, there is. There is a presumption that the law is obeyed.

Mr. Katz: That is right.

The Court: Which is a presumption of innocence that a man doesn't disobey the law. I think the presumption of innocence covers that.

The next one, any witness in the case who is influenced or induced to become a witness, that is harmless. If you want it, I will give it.

Mr. Kosdon: We would like it.

The Court: Then the next one, United States government bonds bearing two different persons' names as co-owners are presumed by law to be equally owned by each person whose name is ascribed thereon * * *

Mr. Strong: What that says in effect is that if you have your name on a bond, whether it is alone or with somebody else's, it is your bond, but the question isn't whose bond it is but whose money paid for it.

The Court: Then there comes into play the question of [1413] the defeat and evasion of the gift tax,

because if in a year he bought \$50,000 worth of bonds, and gave \$25,000 worth of them to his mother, or half of them to his mother, then he would have to pay a gift tax. He is not charged, however, with evading the gift tax.

Mr. Kosdon: No, your Honor. It is completely a separate and distinct return.

Mr. Strong: I think there is a line on the return.

Mr. Katz: No. There are separate returns and separate taxes.

Mr. Kosdon: There are separate amounts involving depending on the family relationship, and so forth.

Mr. Strong: To save time I won't object to it because I don't think it means anything.

The Court: The next one, gifts do not constitute income, I still cannot see how that enters into this case.

Mr. Robnett: There is some evidence there from which it might be argued that many of these things were gifts. People came in and left money and were not buying anything from him. What is it, lost and found or a gift?

The Court: You mean if they just bought something from him?

Mr. Robnett: They come in days after, they had already paid their bill and they come in days after and give him money. [1414]

Mr. Kosdon: As a matter of fact, the evidence is to the effect that the transactions by the Acme

Meat Company were on an accounts receivable basis rather than a cash basis, with a few exceptions.

Mr. Strong: Then we should take out the instruction dealing with the cash basis.

Mr. Katz: They are referring to cash or credit with respect to sales.

Mr. Strong: There isn't any evidence from the defendants on the defendants' part or any of their witnesses as to what this money was, gifts or anything else.

The Court: You may have an exception.

Mr. Robnett: We would like an exception on the ground that it is not covered by any other instructions and it truly states the law and that there is evidence in the record that would justify the giving of the same.

Mr. Strong: May I look at those?

Mr. Robnett: There is no proof by the government that all of the money that they claim or any particular portion of it was income.

Mr. Strong: I will withdraw my objection to X-10.

The Court: X-11 is the definition of a gift.

Mr. Strong: I will withdraw my objection to both of them.

The Court: I will give X-11 first and then X-10, or [1415] either way.

Now the next one, relative to declaration of estimated tax, in view of the fact that there is some evidence in there about the estimates, I will let those stay.

This one here I will modify to this extent——

Mr. Strong: If your Honor gives that, I would like to have your Honor reconsider my instruction on that. If the instruction is to be given on the basis of what the defendants are to be found not guilty, then I think there should be an instruction as to what the basis is on which they should be found guilty, and that is my instruction No. 12-a. Also my instruction No. 13.

The Court: But this. "If you find that he paid all or a substantial part of the income due and owing * * * for the calendar year 1944, you must find the defendant Sam Ormont not guilty."

Mr. Strong: There is another objection. It says, "If you find that he paid." Paid what? Paid today or on a date when he had to file the return? That is the point.

Mr. Kosdon: Paid at the time he had to file his return.

Mr. Strong: But all the evidence put in by the defendants is intended to establish that he paid it some time or other, some other date.

Mr. Robnett: No, it shows when he paid it.

Mr. Katz: I have a similar instruction that takes the [1416] attitude that it goes directly to one of the elements of the offense. If the tax has been paid there is no offense.

Mr. Strong: That is not the law. The tax was paid when it had to be paid, then there is no offense.

The Court: No, I do not think that instruction should be given. I will make this one X-10.

Mr. Robnett: We except to that on the ground

that that is a statement of the law and is not covered by any other instruction.

The Court: Now the next one, I think that can be given. It is just a summary.

Mr. Strong: May we add to that?

The Court: Just a moment. I may add your No. 12.

Now let me get the same one for the defendant Himmelfarb. That is your No. 26. Himmelfarb's No. 26 I will give and government's 13 except lines 10 to 13.

Mr. Katz: If the Court please, which one are you referring to now?

The Court: I am giving your No. 26 as written.

Mr. Katz: With respect to 26, my attention has been called to the fact that the word "substantial" was omitted and which should have been in there. "any substantial part of the income tax due." That is at line 5. Also at line 14, "any substantial part."

The Court: Very well. [1417]

"To establish its case, the government must prove not only an attempt by the defendants willfully to defraud it, but also that a tax in addition to what the defendants had already paid remains due and owing."

I will mark that No. X-12. And you except to it on the ground that that is the law and is not covered by any other instruction?

Mr. Robnett: Thank you. That is our exception.

The Court: The next one, that it doesn't make it a crime for the defendant to conceal——

Mr. Strong: The law makes it a crime for any person required who willfully fails to collect or truthfully account for. Truthfully account for, the reverse of truthfully accounting for is concealment.

Mr. Robnett: No.

Mr. Kosdon: Not at all.

Mr. Katz: You can account for it and still conceal the source from which it came.

Mr. Strong: It doesn't say anything about source.

Mr. Robnett: That's just it, it doesn't say anything about source in there.

Mr. Strong: This is your instruction we are talking about.

Mr. Robnett: That is the way I understood it.

The Court: Does not make it a crime for the defendant [1418] taxpayer to conceal or fail to disclose the source or sources of income."

That section doesn't, but some other section of the law does.

Mr. Katz: We are not charge with it in this case.

Mr. Strong: Then why bring it up? This is your instruction.

Mr. Kosdon: It is part of your indictment which specifically sets for that.

Mr. Katz: The court held that that was surplusage, that that doesn't state an offense in so far as the concealing was concerned.

The Court: I will give that and I will give it up here in the correct order.

Now this other one here, I don't know what number it is, that I think is covered sufficiently by the other instructions.

Mr. Robnett: Yes, I think the one Mr. Katz has covers it.

The Court: This one likewise is covered generally by the other instructions which are given on the subject.

Mr. Robnett: Is that all?

Mr. Strong: That is all of yours.

The Court: Then we have these instructions of the defendant Himmelfarb. Evidence of a defendant's good character is [1419] in the same category as other facts and may create a reasonable doubt. That is all right. That is your No. 15.

No. 17 I think is covered by willfullness.

Mr. Katz: I thought that one was the one that your Honor felt was covered by the instruction as to presumption of innocence.

The Court: And willfullness. I think the subject matter is sufficiently and correctly covered.

Do you wish to except on the ground that 17 is the law and is not covered?

Mr. Katz: I do so except, your Honor.

The Court: No. 22 is covered by your instruction No. 26.

No. 23 is covered by your instruction No. 26.

No. 26 covers the basis upon which he is to be found not guilty.

Mr. Katz: If the Court please, the matter of 26 refers to the joint matter of evading or attempting to evade. No. 22 refers to the matter of the return being false or fraudulent, and it touches one of the specific allegations in the indictment. I believe No. 22 to be a correct statement of the law. I do not believe it to be covered by instruction No. 26, or any other instruction, and I make the exception on that ground. [1420]

Mr. Strong: No. 23 deals with a misdemeanor, your Honor.

The Court: He is talking about 22 now. I think your No. 26 covers it sufficiently because the crime is attempting to defeat and evade by filing a false return. In other words, I cannot instruct on each piece of evidence.

Your No. 27 is declined. Do you except on the ground it is the law?

Mr. Katz: Yes, I do, and it isn't covered.

I wish also to note the same exception with reference to No. 25, on the ground that the general instruction on willfulness does not necessarily cover the matter of mistake, ignorance and that we are entitled to a specific instruction with respect to mistake and ignorance, and I make the exception upon that ground, that no instruction covers it.

The Court: Very well.

Failure of a defendant to testify I will give, your No. 44.

And your No. 45 I will give.

Mr. Katz: May I note the same exception with respect to requested Instruction 29 and 30, which

go into the matters of mistake and ignorance, negligence and carelessness, as being proper statements of the law and not covered by any other instructions?

The Court: Very well. The exception is overruled.

I will give your No. 46. [1421]

Mr. Katz: Your Honor has given 31, I believe, and has given 32.

Mr. Strong: As to 46 there is another one that is from the California jury instructions.

The Court: Yes, this is copied from it.

Mr. Katz: Is your Honor giving No. 35?

Mr. Strong: That is covered by willfulness.

The Court: No.

Mr. Katz: I believe we are entitled to a specific instruction with respect to the belief of the defendant as to when his tax is due and payable. It isn't covered by any other instruction and I believe it to be a correct statement of the law. I ask that an exception be noted.

The Court: Very well.

Mr. Robnett: May I inquire? I understand 12-a of the Government's was out. Is it still out?

The Court: No, I am giving it. I am giving your instruction and then following it with that, except the second paragraph.

Mr. Robnett: I wish to except to 12-a on the ground that it is not a correct statement of the law, that the filing of a return must be false and fraudulent as well.

Mr. Strong: That is covered by the correspond-

ing defendant's instruction which tells the jury to bring in a verdict of not guilty. [1422]

The Court: A false and fraudulent return, I think that is correct. I will add that.

Mr. Robnett: As to the willfulness instruction that your Honor said he was giving, the wording of that as it would apply in this case as it now stands, separate defendants and separate counts, I believe is a little ambiguous. It says, "and when you have considered all of the acts of the parties."

The Court: Yes, when you have considered all of the acts of each defendant.

Mr. Robnett: Couldn't they consider the acts of one defendant as finding the other defendant willful? I don't think they can do that.

Secondly, "and their relation to each other," the relation of the parties or the relation of the facts?

Then "the circumstances under which they were done," I suppose that "they" refers to the acts.

The Court: When you have considered all of the acts of the parties. When I say "the parties" I mean the Government as well. So I will leave it "the parties." That is, the acts of the Government with relation to their conversation, and so forth and so on. I do not know how I can make it any more comprehensive.

Mr. Robnett: The willfulness is the willfulness of the defendants in the alleged offense. [1423]

The Court: That is correct, but when you consider the act of the Government in its conduct towards the defendants then you decide whether or not the defendants' conduct was willful.

Mr. Robnett: I see.

Then at the last you have, "from all of these you will determine whether or not any act, if done by the defendant was beyond a reasonable doubt done willfully"—just any act? There are lots of acts that they have done, even if they were willful they still wouldn't make them guilty of an offense. It would indicate there that if they find any act was willful that then the willfulness is established in this case.

Mr. Strong: It doesn't say that at all. It discusses willfulness and it specifically makes willfulness an element of every material fact and act.

Mr. Katz: The act should relate to the matter of their income tax return and not to any other willful acts that were not willful acts.

The Court: Any act charged in the indictment.

Mr. Strong: Or constituting an element of an act charged in the indictment.

The Court: Any of the acts charged in the indictment, if done by the defendants was beyond a reasonable doubt done willfully.

Mr. Katz: That limits it to the acts charged in the indictment. [1424]

The Court: That is the attempt to evade and defeat. That is the point.

Mr. Katz: If it is limited that way, that clarifies it.

Mr. Strong: I just want to make the record show that this limitation on the use of the term "willfulness" with relation to acts has come solely

from the defendants and not from the Government, at their request.

The Court: I understand.

Mr. Robnett: Now, your Honor—I don't believe since we were here last night this has come up—will your Honor please give an instruction to the jury that any evidence in the record as to matters pertaining to 1942 or 1943 as to Samuel Ormont are to be considered for the sole purpose of finding willfulness or intent?

The Court: Yes, I will give such an instruction. Will you draw it and submit it?

Mr. Robnett: We will draw it and submit it.

The Court: Either one of you.

On the general instructions, there is nothing peculiarly different in the way a jury is to consider the proof, I suppose you have read that?

Any act or thing done by the judge * * *

Duty of the jury to consult one another * * *

Mr. Strong: I am satisfied. [1425]

The Court: In other words, after I give the opening general instructions, and then these specific instruction, I follow with a series of closing general instructions.

Mr. Katz: One thing I would like to touch upon, if the Court please, and that is this: I don't like to ever have an occasion to interrupt counsel in the making of an argument, and I want to avoid that if I can. That is the reason I mention it. Counsel do not like to be interrupted, and particularly to get into any discussion with respect to the matter of an objection.

Now I am assuming that Mr. Strong in his argument to the jury with respect to the defendant Himmelfarb will not reach over into and apply to Himmelfarb any evidence that came in with respect to Ormont.

Mr. Strong: I think that that is an assumption that doesn't even have to be stated, your Honor.

Mr. Katz: On the other hand, I want to clarify the matter as to the right to apply that evidence by way of going to it, to use it to draw inferences or deductions therefrom.

The Court: Well, we cannot settle the argument in advance. We have to wait until that comes.

Mr. Katz: Except that your Honor has made some indication with reference to it.

Mr. Strong: But, your Honor, may I say this, just so that we don't have too much interruptions, if Mr. Katz is [1426] minded to interrupt, that I do intend to refer to every material physical fact with reference to the defendant Himmelfarb, including when he went to the lawyer, who he went to from there, and everything else that is in evidence.

The Court: It is only the instructions we can settle in advance, not the argument.

Mr. Strong: When do we come back?

The Court: 2:00 o'clock.

(Whereupon, at 12:45 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.)

Los Angeles, California, Thursday, June 12, 1947
2:00 p.m.

The Court: United States vs. Ormont and Himmelfarb.

Mr. Strong: Ready.

The Court: The usual stipulation?

Mr. Strong: Yes.

Mr. Robnett: So stipulated.

Mr. Katz: So stipulated.

The Court: There were some exhibits that were stricken from the record. What were those numbers?

Mr. Katz: 36 B and C and 32.

The Court: 36 B and C were records of the bank accounts of the defendant Himmelfarb before 1944 and after 1944. No. 32 was a deposit slip of the defendant Phillip Himmelfarb.

The case is now pending as against the defendant Sam Ormont as to Count 1 only, and as to the defendant Phillip Himmelfarb as to Count 2 only.

Counts 3 and 4, those relating to the income tax return of the defendant Sam Ormont for the years 1942 and 1943, the Court has given a judgment for the defendant upon motion of his counsel. The evidence in the record, however, which relates to the conduct of the defendant, Sam Ormont, during the years 1942 and 1943, was not stricken from the record, but was left in the record in order for you to determine whether or not there was a specific intent, and whether or not there [1430] was

willfulness, as I shall define "wilfulness" to you, on the part of Sam Ormont to do the things which he is charged with having done in Count 1, which relate to his indictment in 1944; and for that limited purpose only.

I think that clears up the matters which have not been disposed of.

Mr. Robnett: It does, your Honor.

The Court: Mr. Strong.

Opening Argument in Behalf of the Government

Mr. Strong: Your Honor, ladies and gentlemen of the jury, this has been a long trial. I think you know that better than I do. And I for one, and I am sure all the other counsel and his Honor are very grateful for the attention which you have paid, throughout this case, to all of the evidence introduced, and everything that was done.

Now is the time when it becomes my duty to try to place before you something in the nature of an analysis of what went into this record; and you remember when I first started out here I told you that the case was something like a jig saw puzzle. The opening statement made by counsel is for the purpose of giving you a general overall view of what counsel is going to hope to prove to you. It is like the picture on the outside of the box; and then, as the evidence develops, and goes into the record, by way of testimony, or by way of exhibits, those are like the pieces inside the box. [1431]

You will get a lot of pieces. Ultimately you ladies and gentlemen, as the jury, will have the job that will fall to you when we have finished here, of deciding what those pieces mean; which pieces mean anything; which do not; and what they will prove with reference to the indictment as it now stands.

You will also have to decide whether that box contains only pieces which have to do with the particular jigsaw puzzle represented by Counts 1 and 2, or whether there are probably a lot of other pieces that have nothing to do with it. It sometimes happens you will be confused, and there will be a lot of extra pieces that have nothing to do with the case. As we go along I will try to point out to you the various things that went into this picture during the three or four week we have been here, which in my opinion—that is just an opinion, for you to decide—which in my opinion have nothing to do with this case, and that do not have any bearing on whether or not the defendants violated the law, as charged in counts 1 and 2.

I will take those facts up later, but just bear in mind at this time that a lot of things in the record may have nothing to do with the case.

As the case now stands, it is relatively simple. It is simpler than when we started. We at that time had four counts. Now we only have two counts.

Count 1 charges the defendant, Sam Ormont, with having wilfully, knowingly, unlawfully and feloniously, attempted to [1432] defeat and evade a large part of his income tax which was due and

owing by him to the United States of America for the year 1944. All of this deals with the year 1944—by preparing, and causing to be prepared, and filing, and causing to be filed, with the Collector of Internal Revenue, a false and fraudulent income tax return. I will go into the substance of it later, as to what the return says, and what I believe it should have said.

Count 2 deals only with the defendant Himmelfarb, and it is a similar charge as to the defendant Sam Ormont, again for the year 1944, and it charges him in about the same way with reference to his income and his tax.

Now, I am going to take up the case of each defendant separately, since Mr. Ormont is only charged now in Count 1, and will point out to you the various pieces of evidence that I think the jury should consider as to Mr. Ormont alone; and then I will take up Count 2 and the evidence which I will submit to you in support of the indictment as to Count 2 as against Mr. Himmelfarb. And I shall separate those two, and keep them apart as much as humanly possible.

You will understand, of course, that as to what I say about the evidence is not to be accepted by you, but it is just an opinion, an argument on my part, and his Honor will instruct you later on—His Honor will instruct you as to all the law in the case, and when I make some reference to some law or [1433] regulation, and if his Honor should instruct you differently, of course, you will abide by what his Honor says about it, and not what I say about it.

But in my argument to the jury I shall attempt to show you what these things are, how they are material here, and then point out how they tie in with the violations charged in Counts 1 and 2 as they actually occurred.

Taking Mr. Ormont first. Mr. Ormont, you remember, is the gentleman who testified here, so you had a chance to listen to him under oath. You had a chance to observe him, his demeanor, his attitude, his manner, as to answering questions, and what he said in reference to them. That is one thing you should take into consideration, because essentially this case, so far as Mr. Ormont is concerned, deals with an attempt to defeat and evade. That, in effect, is another way of saying that you didn't take the whole thing; you only took part of it. And in determining whether or not that happened as we charged, it is very important that you keep in mind how the defendant himself answered questions.

Was he open? Was he frank? Did you like his answers? Did you like his demeanor on the stand? That is one thing to consider.

The Government's case is not based upon the manner in which he testified. It is based upon much more important evidence; much stronger evidence, which I will try to delineate. [1434]

Basically, what is involved in the consideration of each of these counts is whether the defendant who is named in the particular count, Mr. Ormont in Count 1, and Mr. Himmelfarb in Count 2, did the acts which are charged in the indictment, and

the second important consideration is, did he do them wilfully? That is the important element, as his Honor will tell you.

I will try to point out to you that he did them, and did them wilfully. As to Mr. Himmelfarb, that he did them, as charged in Count 2, and that he did them wilfully.

Mr. Ormont, in Count 1 of his income tax return, states that he reported that his net income was \$12,174.50. There can't be any possible question about the accuracy of that, because you will have before you the income tax return of Mr. Ormont for the year 1944. That is in evidence. You can examine it. You will find that it states so. You will find that the indictment sets forth **how much tax he reported and paid**, and you will find, by examining this return, this amount of tax.

So the basic problem is, did he have any more income that he did not report? Did he have any more income, which he kept from the Collector of Internal Revenue, wilfully, and deliberately, for the purpose of attempting to defeat and evade tax which was due from his income, and which should have included the amount we say he earned in addition. [1435]

The same thing applies of course with reference to Mr. Himmelfarb and his return.

Now what evidence is there in the case which tends to show that Mr. Ormont had income in addition to this \$12,000-odd which he reported in his return? The evidence in substance is this: You have bank records which were introduced in evi-

dence, which you can examine, bank records showing deposits, records showing moneys coming and going. You have the testimony of Mr. Eustice who testified from these records. He has no figures that he gets out of thin air; he gets figures from the records that he testified to you about. His Honor told you that it was mostly opinion testimony. It is what Mr. Eustice summarized from the records that he saw, not only these records which are before you but he also had available, as you remember, the records of the Acme Meat Company, which are not in evidence but which he had available and as to which his Honor permitted him to testify, to say what he found and what he saw and what relation that had.

Then besides the records and Mr. Eustice's testimony from the records, we had the testimony of Mr. Bircher. You will remember Mr. Bircher, he is one of the agents who talked to Mr. Ormont—I think it was on the 24th day of May, if I am not mistaken, 1945—that conversation is before you. We have the testimony of Mr. Phoebus, who was also present at that conversation. Now I am going to go into these conversations [1436] because you will see that they are very important because of what they disclose.

We had the testimony of Mr. Link. We have the testimony of Mr. Smith. We had the testimony of Mr. Gorgerty. You will remember Mr. Gorgerty was the nice little gentleman who sat on the stand here, he was from an insurance company.

And besides all of these witnesses we had Mr. Ormont, and I will show that Mr. Ormont's testimony as it is supports the Government's case without any doubt, that anything Mr. Ormont said and the way he said it is in support of the Government's case. So that we have Mr. Ormont in effect as a witness to show that he had this additional money and that he didn't report the tax as charged.

Mr. Eustice, you will remember, testified that he made an analysis of the money going in and the money coming out, and as you will recall he testified in order to check and make sure as to where that money came from he went back as far as 1931—1931—to check the income of 1944 he checked all the way back to 1931, and he made a careful and complete analysis. And you will remember the cross-examination, three or four days of it, testing every iota of statement that was made by Mr. Eustice, testing him right and left, trying Mr. Eustice, did he remember or didn't he remember, where did he get it, where didn't he get it, asking hypothetical questions, if this was the fact—nothing in the record to show that it [1437] is the fact—but if such-and-such is the fact then you subtracted that from this, and you added that to this, what would you have? And if you took into account this check which I show you and you subtracted that from this, and added this to that, what would you have? And here is a sheet of paper, add to it some figures—I will give you figures to add to it—now take those figures from such a figure, what

have you got? If the moon is made of green cheese, what have you got? The question in this case is, did the defendant have any more income. It isn't based upon any hypothesis of what might have happened if certain facts existed or didn't exist. There is nothing to show that they did exist, nothing to show that any of these supposition questions are based upon anything than what they purport to be, if and assume.

Well, you can assume all kinds of things. You can assume enough figures put together where, if you subtracted it from the amount reported as income and the amount paid as income, the Government will be owing Mr. Ormont money. That is all on suppositions, on assumptions—nothing in the record to show that it happened.

You will remember that after all that questioning and all of these checks that we used to ask him, what about this check, what about that check, did you subtract this one and did you add this one, if you did that what would you have? You will remember I took all those checks and I took each one [1438] and I said to Mr. Eustice, I said, "Now take this check, did you include that amount in the sum which you say is unreported income?" He said, "No, sir."

And the next check, "Did you include that amount in the sum which you say is unreported income?" He said, "No, sir."

And we went down the line, and my recollection is that there wasn't a single check upon which

he had been cross examined or questioned, not a single check, that he included as part of the unreported income.

Well, if those checks aren't included as part of the unreported income, what have they to do with this case? You might just as well bring in my checks too and ask him if he deducted those sums what would he have. It has nothing to do with this case, absolutely nothing.

Every single check—and you can examine these checks—some \$6000 in this sum, piles of them, all marked by the defendant and all put before Mr. Eustice and cross examined, if and maybe and assume, but not a single one of those checks was taken as part of the unreported income. And if that is true then there is nothing to worry about those checks, no reason to deduct those checks from the unreported income. He didn't take them in. They had nothing to do with his calculations and nothing to do with the figure which he says is shown to have been the additional sum of money which was furnished by Mr. Ormont and which was not reported. [1439]

And then we had this business of cross-examination of applications for war savings bonds. Any connection between the applications that were put up by defense counsel concerning which he questioned Mr. Eustice and any of the particular bonds that Mr. Eustice took in as income bought with unreported income? No connection shown, just an application. And every one of those bonds, by the way, must have been bought with an application.

Checks, figures, \$1322.27. "Add up these figures," I asked Mr. Eustice. "Were any of those sums taken in by you as unreported income?" He said, "No, sir." It has nothing to do with this case at all. More checks—more checks.

I ask you if those aren't some of the extra pieces in the box. We are dealing with a jigsaw juzzle, with certain evidence. I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. Very confusing, no doubt about it, and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get to the final picture. You will have so many pieces that have nothing to do with it that you may give up. But I say to you, ladies and gentlemen, that the evidence which shows what was the unreported income is so clear and convincing and completely undisputed, completely undisputed, that there isn't any doubt as to the unreported income and there isn't even any substantial doubt as to what [1440] the sum is.

Now what did Mr. Eustice tell you specifically? The year 1944—I am only going to deal with 1944—he told you how much the original return reported, a sum which was shown as salary, some \$4500. Mr. Eustice said that he found about \$27,000 more than Mr. Ormont had earned and hadn't reported. Rents shown, various other deductions and items shown, unreported. What was the difference? The difference was between the amount reported, some \$9000, and the correct amount, some \$36,000.

I ask you, is that difference substantial? Is that a sum that one overlooks in his computations as you might small expenditures for hairpins or something? Is that something that one doesn't take into account or is that something that someone wilfully and deliberately conceals for the purpose of defeating and evading the payment of a substantial part of his tax?

And as to these figures which are in the record—they might not be precise but your memory is much better than mine, I am sure—Mr. Eustice told you where he got those figures. He told you how he got them. He told you what he based them on. And there isn't any contradiction as to the figures.

Yes, there is an attempt to confuse, there is an attempt to drag something else in, but as to the figures as to which he testified, they are all in there. There were one or two [1441] items which Mr. Eustice took in as income which might or might not be income, which might be repayment of a loan or something. I don't remember what the items were, but I don't think that they exceeded \$2000. I don't think they even reached \$1000. But the difference between \$1000 which he may have taken in which he shouldn't have—I don't say he did, but if he did—the *difference that* and the \$26,000 or \$27,000 additional, that is immaterial. That is just a drop in the bucket. That is another extra piece to take your attention off the main figure.

I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts shown on the books and records of the Acme Meat Company and the amounts shown upon the bank records that are undenied and undisputed as of this amount, and that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.

Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—this thing went on for so long that after a while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on. And that is another thing to consider, as I told you, because this case deals with concealment of money, failure to report money [1442] and an attempt to defeat and evade a tax. You take into account what goes on with reference to all disclosures and everything. Are you getting complete information, or have you got just the information that Mr. Eustice put in, undenied, undisputed and corroborated? I will show you how.

Mr. Link testified. Mr. Link, as you noticed, spoke with an accent. I think he said he was German. He said he had been a bookkeeper for Mr. Ormont for a large number of years. I don't remember why he said he left, but my recollection is that it was something not very pleasant, some reason he had that was not a very good reason. But

the important thing is that he testified to, and the important thing that counts in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.

Mr. Ormont told you that he prepared income tax returns for certain years and he prepared those returns from the figures shown on the books and he was supposed to get all the invoices and he was going to enter all the income on the books so that he could prepare these things later on. And he spoke to Mr. Ormont and he asked him, "Have you got any more income?" [1443]

"No."

And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books because, as he told you, he had never been given those invoices. And what did those invoices show, ladies and gentlemen? Those invoices showed on their face—and they are part of the exhibits; you can examine them—but they showed on their face that the money shown on them was paid, the date it was paid, and it had Mr. Ormont's signature. That is some more money that isn't on the books, some more money unreported, some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont. [1444]

Then you remember Mr. Link told you about the relationship between Mr. Ormont and Mr. Himmelfarb. You will remember he told you why Mr. Ormont said they were putting Mr. Himmelfarb down as an employee. He had reasons. Whatever the reasons are doesn't make any difference; the important thing is that an important fact like that he was concealing, and he was putting something on his books not to show the true facts but to show a fact that wasn't true for purposes of his own, whatever they may be. What is the difference? Doesn't that show you what sort of intellect you are dealing with, what sort of purpose and intent he has in mind? Doesn't it show you what sort of willfulness he had in accounting for his return? Then in 1944 he begins to do other things which we will go into more in detail in a moment.

And was Mr. Link's testimony shaken? On cross examination the questions sounded to me as though they were trying Mr. Link. Can't a witness come in here to this court or any other court and testify without a searching, thorough probing into his motives? Can't an honest man like Mr. Link, Mr. Gorgerty, or any other man take the stand and tell what he knows without an attempt to show that he has some evil motive, something behind it? An informer. Suppose he is an informer? I tell you, ladies and gentlemen, that a lot of laws are enforced because people come in and tell the prosecuting officials of what happened, and if the public of this [1445] country is not interested in telling what happened when they know the events, there will be a

lot less enforcement. There is nothing wrong with telling the authorities, who represent you, your officials, your government, coming in and telling them what you as the people of the United States know about certain facts. There is nothing wrong with that. And no inflection of the voice in the question, no accusing look or anything else will change that salient fact, that in this country when a person who is a citizen, who is a resident of this country, has a knowledge of certain facts which may be a violation of the law, it is not only his privilege but I submit to you that it is his duty to come in and tell the proper officials so that proper action can be taken by his representatives, by his government, by his enforcing officials. There is nothing wrong with Mr. Link coming in, informer or in any other way; if he has information which he thinks shows that something is being done in violation of the law it was his duty to come in and tell, and he did tell. What is wrong with that? What difference does it make? The question is, was there anything to shake his testimony as to what Mr. Ormont told him to put on the books and records as to the changes in the figures that he told him about? As to these changes, is there anything to contradict that? Search your minds and see if you can find any contradictions. I couldn't. I still can't. I don't think there are any. [1446]

Then we had Mr. Gorgerty. He had nothing to do with this case. He is not one of the parties. He doesn't work for any of the parties. He sells insurance. He is in business. He has a lot of clients.

One of his clients was Phillip Himmelfarb. He comes in and testifies as to the conversation he had. Mr. Ormont was present, Mr. Phillip Himmelfarb was present, and Mr. Himmelfarb or Mr. Ormont—I don't remember which; I think it was Mr. Himmelfarb—told him that they were partners and he wanted to change certain insurance policy to provide for coverage for the partnership.

Ormont and Himmelfarb partners. Anything wrong with Mr. Gorgerty coming in here and telling the truth? Must we also probe behind Mr. Gorgerty? But I won't go into Mr. Gorgerty, I think Mr. Gorgerty took care of himself. You heard him. You saw him.

But again that is another fact. If everything is open and aboveboard, why are they concealing the fact that they are partners? Why all this to-do over whether they are partners or not? I can't figure out whether it makes any difference or not, whether they are or aren't, but I know it makes this difference, that everything that is concealed tends to show that the person who you charge as having violated the law, it tends to show whether he violated it or not, it tends to show how he operates, and it is one of the facts that you should take into consideration as to the element of willfulness.

And keep this in mind, because we are going to get to a very important instrument, the fiscal year return—so bear in mind that the policy on its face, and it is in evidence, you can examine it, is a policy covering Sam Ormont and Phillip Himmelfarb and it says “Co-partners dong business as Acme Meat

Company." And then remember also that that policy shows that it covers meat. That is very important, meat. That is what they are selling in this case, and I will tell you about it more when we get to the fiscal year return.

Then you remember Mr. Smith came down here. Mr. Smith had borrowed some money from Mr. Ormont and Mr. Smith had paid \$63 interest on the money. He told you when he paid it and I think that counsel for the defendant conceded, he stipulated, and his Honor will tell you that once a fact is stipulated to you have to consider it as the fact, you don't have to decide whether a witness is credible or isn't, it is a fact; he said he paid \$63 interest. Was that \$63 interest reported on the return where it calls for the reporting of interest in the year 1943? No.

Just remember now, you are not trying it for 1943, only with reference to 1944. But on the element of willfulness, whether he willfully and deliberately, as charged in the indictment, in 1944 attempted to defeat and evade a large part of his tax, you can take that into account too. It is another incident of concealment of something or other. It doesn't [1448] make any difference what, it just shows you what you are dealing with. It just shows you whether a person acted willfully or whether later on in 1944 it was all a big mistake.

Then we had Mr. Malin. Mr. Malin was the accountant. And without going into what Mr. Malin said, I would just like to call your attention to the circumstances surrounding him. Now the defendants asserted that they thought they were on a

fiscal year basis, so they prepared a fiscal year return. But ask yourself this question: [1449]

A person who has not anything to conceal, and is going about to prepare his income tax return, which he is supposed to file, does he need the help of an accountant? He goes to an accountant. Why does he first go to an attorney? Why does he first go to an attorney to get help in connection with that, and three or four days after the income tax investigators come down to talk to him?

Just consider now the circumstance of the defendants going to an attorney just as soon as the Internal Revenue investigation starts; they go to an attorney, and the attorney takes them to an accountant, and they prepare some documents, which you see filed here. Just consider whether those people, who go to an attorney for that purpose, if they go to an attorney? Ask yourself that question, and ask yourself whether or not it has some bearing upon the question of wilfulness, of good faith, of clean purpose?

And Mr. Malin then prepared some documents. Those documents are in evidence. Mr. Malin prepared the fiscal year return, and he prepared different exhibits, so far as Mr. Ormont is concerned, —51 A, B, C and D. Those exhibits, if you examine them, you will find tend to corroborate Mr. Eustice's testimony to within a few hundred dollars. When you consider that they deal with thousands and thousands of dollars, that is a complete and absolute corroboration.

The exhibits prepared and signed by the defendant himself, [1450] the defendant Ormont, if you will examine them will, on their face, tell you the whole picture, even if Mr. Eustice were not giving testimony about them; if all you had were the exhibits 51 A, B, C and D; if all you had were the income tax return for 1944; if all you had was the income tax return which shows how much money was earned in that period; those documents alone tell you what the additional income was.

I will go into that in a few minutes, but first I want to take up the testimony of Mr. Bircher, and Mr. Phoebus. You remember they began their investigations, or at least the first time the defendant Ormont was contacted was around May 18th. The testimony of Mr. Bircher and Mr. Phoebus is completely and wholly undenied, uncontradicted. There isn't a single iota of evidence to offset anything they said as to what Mr. Ormont said to him, or as to what happened. Not a word.

All Mr. Ormont testified to were those checks, and those transactions. You will remember that. So that that testimony is completely uncontradicted, undenied and undisputed, and is testimony which you can readily accept at its face value as being true. And there is no reason why you should not.

What is that testimony? That testimony shows that on the 24th day of May, after the investigation had been in progress for about five or six days, Mr. Ormont came to the Internal Revenue Office, here in this building, saying, in effect, that he wanted to look people in the face; he wanted [1451] to get

this thing over; that he wanted to clean things up. A very nice attitude; very complimentary and commendable, especially commendable when it is given effect six or seven days after the investigation takes place.

I say to you, there is nothing so salutary as a defendant or a person being investigated to rush in and pay his taxes after they have caught up with him. If that could be done, there would never be any problem; there would never be any investigation. You might have an investigation, to get them started; but you never would have a prosecution involving the non-payment of tax, non-reported tax, because all a person would have to do, as soon as he finds he is caught, is to surrender, and once they get the handcuffs, he comes in and wants to pay. That isn't the question. The question is not whether on the 24th day of May, 1945, the taxpayer was willing to come clean, and pay up the money. The question is, what date did he file his income tax return? The date alleged in the indictment? Did he at that time report any income at that time; report the facts due at that time? That is the date alleged in the indictment, the 15th day of March, 1945; not the 24th day of May, 1945, five or six days after the investigation, and after finding he is caught.

That is not the date. It is too late. He came up that day, and had a discussion with Mr. Bircher, and Mr. Phoebus. I am not going to go into that discussion. You will remember [1452] the discussion; what went on. But the sum and substance of it was that Mr. Ormont was operating the Acme

Meat Company. He was selling meat. He marked on the invoices the price for the meat. In addition to that he gets side money, extra payments, additional moneys. He would like to call them gifts. He would like to call them anything else.

But I ask you, what are those payments? Do you think they were payments in the business, which Mr. Ormont earned, as he reported, some \$12,000, in the year 1944; he had such a fine clientele that they gave him gifts, approximately eight-twelfths of the sum he reported in 1945; about \$220,000.00. Do you believe he got \$220,000.00 in free and voluntary gifts? . You know what was going on with the sale of meat. You know what those payments are. I am not even going to mention them by name. It would be insulting your intelligence to mention them,—these extra, unreported side payments, that he took with the left hand, the amount of money, and put it in the left pocket, and then he puts in the Acme books, and takes the extra money with the right hand, and puts it in the right-hand pocket. Oh, that was a joint venture. That was separate and apart. Simultaneously, on the same sale of meats, he has engaged in two separate enterprises, one selling at the price shown on the invoices, and the other getting this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being [1453] split on the basis Mr. Bircher and Mr. Phoebus told you.

And they take this money, and they put it away, Mr. Ormont particularly, and on the 24th day of May, 1945, when he is caught, he rushes in and files

a return. But even in the return which he filed on that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money. It says, Business or Profession: Miscellaneous enterprises. What miscellaneous enterprises? What enterprises separate and apart from the sale of meat by the Acme Meat Company?

Mr. Link was asked, and he testified, so far as I know, Mr. Ormont did not have any other business, than the Acme Meat Company. What miscellaneous business enterprises, from which is earned \$71,000, without telling the nature of the enterprise, or anything? What is this income? It says: Miscellaneous income.

Any deductions? You know, you have deductions when you earn money; you have to return the gross income, and you are given deductions, and then you have your net income—miscellaneous enterprises; joint ventures of some sort.

I ask you, ladies and gentlemen, if that kind of testimony will tell, whether that kind of evidence will convince you that their income tax was reported properly, or if it was on a fiscal year basis? Money that comes in as extra payment, money collected, which the right hand keeps from the left [1454] hand, money, after the investigation starts in, reported as miscellaneous enterprises, miscellaneous income; no expense, \$70,000, split, in two years—do you think that is a bona fide business venture, on a fiscal year basis, when he rushed in, on May 24th? I won't go into that. You know

what transpired on that date, and his Honor will instruct you as to what you should consider in that connection, and you will decide for yourself if it is a bona fide joint venture, bona fide business enterprise on a fiscal year basis, or is this just a method concocted up in a hurry, after the investigation has started, to account for money, to excuse it, to report it, to get out of any possible charges of violation.

The investigation starts on the 18th. He rushes to an attorney; gets an accountant on the 21st, and quickly, as fast as he can write, to get up a document which is filed on the 24th, and it was on a fiscal year basis. The right hand, a fiscal year basis, and the left hand is on a calendar basis.

This fiscal year business is really very simple in this case. If it were true that they had a separate business enterprise, and it was run on a fiscal year basis; if it was apart from the Acme Meat Company's operation; if it were true they had some other basis of earning money, whether a joint venture, or a partnership; if it were true they were on a fiscal year basis, and the fiscal year started May 1, 1944, and ran to April 30, 1945, this would be a return properly filed, and [1455] the income would be properly reported.

Do you think they had a separate joint venture, apart from the Acme Meat Company? Even in this return it does not say anything about a partnership. You will remember Mr. Gorgerty testified they said they were partners, and they had an insurance policy, during the same period, and Mr. Gorgerty said that they are partners. They gave the

insurance policy as partners. What does this joint venture say? It does not say from what; it does not say anything. 50 per cent of the money to Mr. Ormont, and 50 per cent to Mr. Himmelfarb. Just take the first eight months of that, which was 1944; take 8/12ths of \$70,000, allocate it to each defendant, and then you will know exactly about the income, because there are no books or records. You will know about how much money they earned in 1944. That money they did not report, although they knew they earned it in 1944; knew it was part of the operation of the Acme Meat Company; and knew it was side money, in connection with the sale of meat. They did not report it.

Ask yourself this: Do you think they would have reported it at any time, if they had not been investigated? Ask yourself. If you find this return is phony, just a means of getting out of a trap, after they find themselves being investigated, after they found that they were caught, disregard this return for whatever it is worth.

They don't report on how or where the money came from, but [1456] that same day, after it was filed—they filed it in the morning; Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus, and had a long discussion. You remember the record. He told them where the money was from. You remember he tried to get out of saying it was extra payments; side money. He made it sound like gifts. They disclosed at that time what that money was, and, if everything was above board, clean, honest, and not a violation of law, why didn't they put it

on the return? Why did they have these hieroglyphics. Miscellaneous income, \$71,000.00. No explanation; nothing. And there was some testimony that they told Mr. Bircher and Mr. Phoebus they were afraid of some other agency finding it out. You remember they stated that, and that's why they concealed it. That is why they did not report it.

But it does not make any difference why they did not, so long as it was wilfully and deliberately not reported, and it should have been reported then, so far as I am concerned. It is up to you to decide finally, in Count 1, whether there was a wilful attempt to evade and defeat the tax which was due.

Mr. Ormont's testimony, so far as I can see, did not in any way tend to establish any innocence on his part. Mr. Eustice disclosed they had accounted with some checks. Those checks were taken in as unreported income by Mr. Eustice. They were not afraid of those checks, and they were shown to Mr. Eustice. Mr. Eustice specifically testified he did not [1457] take those sums of money in as part of the unreported income; that he did not know whether they were used to buy bonds, or not to buy bonds, or were used for living expenses or not. We don't care. The only thing we are interested in here, is the thing charged in the indictment, was it a wilful and deliberate attempt to defeat and evade the tax by failing to report the true amount. [1458]

Now I don't really see, as I say, why he shouldn't deal only with those things. We might as well bring in a lot of other checks that have nothing to do with this at all. Those checks, as a matter of

fact, show nothing. As a matter of fact, by discussing only a few checks I think that that also bears upon willfulness. If you have nothing to hide why discuss only a few checks, especially checks that are shown, at least as to part of them, not to have been taken in as part of the unreported income by the agent.

Now some questions as to whether these things were gifts, this money he received on the side was gifts. I will leave that to you. You have had experience and you have been in the world long enough. Do you think that in a business which produced an income that was reported of \$12,000 for the year 1944, do you think that the customers of that business brought in \$70,000 in gifts? That is a new term for those side payments, gifts, voluntary gifts. You don't have to pay it, but what do you get if you don't? You know what those payments were.

Then Mr. Ormont told you about cash he had, large amounts of cash. How much cash? \$11,000, \$12,000. How much did you accumulate in the preceding year 1941? Don't know. About how much? Oh, between \$700 and \$1000. Every year between \$700 and \$1000. Why didn't you put it in the bank? His mother said not to keep all his eggs in one basket. [1459]

I wish if you had the time that you would look at the bank deposits of Mr. Ormont. They are in evidence. The accounts are in evidence. Just see how much money Mr. Ormont did put in the banks during that period. See the staggering sums of

money going into those accounts as compared to the amount of money which he testified was his income for the year 1941 and the preceding years, the years in which he said he didn't want to put his eggs in one basket. A couple of Japanese banks failed and he was concerned about banks. Why this \$12,000 that he held out and didn't put in the bank was a drop in the bucket compared to the sums that you will find on those slips. And I am not going to go into it because you can just scan them and see the size of the deposits going in, and then decide for yourselves whether what he told you is true, whether the reason for having cash on hand and not putting it in the bank had something to do with banks or something else, and then from that decide the more important question, did he actually have cash on hand, do you think he had that cash, or do you think that that is something else to becloud the issues in this case?

And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in 1943 out of the \$12,000 he bought about \$8000 worth of bonds. You remember that testimony, \$8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference [1460] from that, that the unreported income which Mr. Eustice claims this man accumulated during that year wasn't really accumulated during that year because he bought \$8000 worth of bonds.

Take the \$8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find

over \$50,000 worth of bonds bought that year—\$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the schedule and it is in evidence.

What is \$8000 off of that? It is \$42,000. Well, let's assume he had \$8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know.

And notice another thing on these checks which I think is very important. Acme Meat Company checks payable to Sam Ormont, signed by Sam Ormont. Again from the right pocket to the left pocket. Where did that money come to originally to the Acme Meat Company? Don't know. Have no way of telling.

If it is income, ladies and gentlemen, as I submit it is, I think as the evidence shows that is it, that doesn't make [1461] any difference who paid it. The important thing is that it is income.

Then you will remember the testimony here dealing with the net worth of the defendant. What is net worth? I don't know if some of you know. Net worth is what you are worth today, what you are worth on a certain date. It is as simple as all that. If you have \$10,000 in the bank and you have a car worth \$2000 and a house worth \$18,000, and let's say you don't owe any money to anybody, you are

worth \$30,000. All you have to do is add the \$10,000, \$2000 and \$18,000 and that is your net worth.

What has he got to show for it, in other words? Most people can take this money and spend it but lots of times they save it or they buy something with it which is around and you can balance it, and Mr. Eustice, as you remember, also testified with reference to net worth.

In other words, his testimony as to the income didn't only come from a showing of how many deposits were made, how much money was deposited, how much money was taken in, but he even checked it back and showed you how much the man was worth in physical worldly goods to show whether he actually had that money. And besides that Mr. Malin himself, with information which he told you he got from the defendant Ormont, prepared net worth statements too. They also show how much worldly wealth the defendant Ormont had as of the period [1462] shown on these documents. And if you compare them with the amount that Mr. Eustice testified to, as I told you before, compare the amount that Mr. Ormont through his accountant shows as his net worth, compare that with what Mr. Eustice told you, you will find very little discrepancy. That I think you can take into account as attesting to the completeness and competency of the accounting work that was performed by Mr. Eustice in this connection. [1463]

But if you don't take that into account, you don't have to because most of the books and records are here, and you can examine them and you can add these things up yourself.

Now again with reference to the testimony of Mr. Ormont here, and how much cash he had on hand, where he got that cash and everything else, it is part of your function to consider if he is telling the truth and how much of the truth. All the truth? Part of the truth? And also in that connection just ask yourself, what about that affidavit that he gave Mr. Bircher? You remember that affidavit that he gave Mr. Bircher.

I submit to you, ladies and gentlemen, that the testimony of the defendant Ormont, if you analyze it coldly, tends to prove rather than disprove the government's case. Not only does it tend to prove it by what he affirmatively said but by what was not known by him, as he testified. That testimony in and of itself tends to establish the truth of the charges that the government has in count 1 of the indictment.

With reference again to the fiscal year return, his Honor will tell you that if you are operating on a fiscal year basis you can file a fiscal year return, provided you keep books and records, but that if you don't keep books and records of the type that is required by law you cannot file a fiscal year return.

What books and records are there as to the \$71,000, [1464] ladies and gentlemen? You remember the books and records. There was a little slip of paper out of a gold-edged book and a little slip of paper that is in evidence. That little slip of paper contained a cumulative sum. It doesn't show where it came from, when it was earned, nothing upon it whereby you could base an examination or

from which you could check and determine if that is the correct amount, just a little piece of paper.

Mr. Ormont had that paper. And you will remember Mr. Bircher asked for a leaf from the book, and Mr. Ormont gave him a leaf from the book. Here it is. It is Government's Exhibit 53. There is the leaf, the little piece of paper. And he has a cumulative running figure showing how much he earned, and he splits it up to show how much he earned in 1944. That is all the proof you need as to the extra income in 1944, right in his own book.

His Honor will tell you what the requirements are as to keeping books, and when you hear that instruction just remember to take into account what this thing looks like and what it shows as compared with what his Honor tells you the books have to show, how they should be kept. Just bear that in mind, ladies and gentlemen.

Now there is a sum stated in the indictment in count 1 as to how much we claim as the correct income. Of course the amount that we say was reported on the 1944 return, you [1465] can compare it, you have it, but the amount which we claim should have been the amount reported and the amount of tax reported as to that figure, I just want to leave you this one word: His Honor will tell you that if we do not prove the whole figure, if we prove substantially the figure, if we prove a substantial amount of money, it is just as good as proving the whole figure. In other words, you don't have to hold the government to proving precisely that sum of money which is stated in the indictment. Substantially that is enough. And the

amount of money shown on that little slip of paper which I have shown you, which is Government's Exhibit 53, as well as the amount of money which is shown upon these documents which were filed by Mr. Ormont and the accountant, that is practically the same as the amount shown in the indictment under count 1. So there isn't any problem as to any variance between the amount shown and the amount that we have established.

Now I am not going to take much more of your time. As a matter of fact, I don't have much more time. But I will say this to you in closing, I said to you at the outset that this is really a simple case. This is really a simple case. And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—just forget all about these things that were dragged in and that have nothing [1466] to do with this case, and what does this case consist of? Just two simple items: How much money did he report in 1944 and how much tax did he pay. That is shown by the return. Did he have any more money that he didn't report, and how much was that, and how much was the tax on that? That I think we have proved beyond any doubt whatsoever, I submit to you ladies and gentlemen, and that the additional sum of money was so substantial as to be almost ludicrous, if it is said to be something on the side or something additional that shouldn't have been reported in that year.

Then there is only the other item, did he do it willfully or was it an honest mistake. We are not here asking you to find anything on the basis of honest mistakes. This case doesn't involve an honest mistake. If it did we wouldn't be here, and I don't think you will conclude that it was an honest mistake. An honest mistake is one thing. Nobody is prosecuted for an honest mistake. Nobody is prosecuted for a belief that facts are so and when others aren't so. As a matter of fact, honest mistakes are not in this picture. We charge that this was done willfully and deliberately and with purposes, the very purpose that we charge in this indictment, that this was done willfully and that it was an attempt to defeat and evade the tax. That is exactly what it was, ladies and gentlemen. That is precisely what I submit to you the government's proof has shown. [1467]

Now that is as to Mr. Ormont. Now I think I have about 25 or 30 minutes for Mr. Himmelfarb.

The Court: Maybe it would be convenient to take a short recess and then you can dispose of your argument and we will hear from Mr. Katz.

We will have a short recess. Remember the admonition.

(Short recess.)

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: Now that's for Mr Ormont. Now Mr. Himmelfarb.

Mr. Himmelfarb, as I said, is charged in count 2. Count 2 charges that on or about the 14th day of March 1945 Mr. Himmelfarb did willfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax which is due and owing by him for the year 1944, by preparing and causing to be prepared and filing and causing to be filed, a false and fraudulent return wherein he stated that his net income for the year 1944, computed on a community property basis, was in the sum of \$4,111.74, for which the income tax was \$656, and the government charges that the correct amount of his net income for that year, also computed on the same community property basis, was closer to \$17,700, [1468] which is a difference of some \$12,000, and that the tax on that should have been around \$5,800, rather than the sum which he reported of \$656.

Again in substance the same contention of the government is supported by the evidence of the same type as that which I mentioned as to Mr. Ormont. Mr. Himmelfarb for the year reports so much money as his income, paid so much tax, and we say that that isn't enough, that he willfully and deliberately didn't report some more money, as I said, around \$12,000.

What is the evidence as to Mr. Himmelfarb? You will remember a slightly different picture here as to Mr. Himmelfarb. First we have an income tax return, which Mr. Himmelfarb filed, and which is Government's Exhibit 4, and that is in evidence and you can examine it. Mr. Himmelfarb filed it

on March 14, 1946, and he tells you where he got the money. According to this his employer's name is Sam Ormont, doing business as Acme Meat Company—Sam Ormont, doing business as Acme Meat Company. Mr. Gorgerty, you will remember, testified that they were a partnership, that Mr. Himmelfarb had that policy changed. There is the policy, by the way. It is also in evidence. That is Government's Exhibit 44. You can look at that. That says right on its face, and the date of the endorsement is May 20, 1944. That is when it was changed. And the name of the assured is hereby changed to [1469] read Phillip Himmelfarb and Sam Ormont, co-partners, doing business as Acme Meat Company. And there is the form itself which shows what it covers, and again it shows here on a standard form that is attached—I won't describe it; it is the first sheet here and you can look at it—but this policy assures Phillip Himmelfarb and Sam Ormont, co-partners, doing business as Acme Meat Company, on merchandise of every description consisting principally of meats, including livestock on the premises, and then it goes into all that other business, it gives the address and everything else.

So there is evidence in this case right at the outset that Mr. Himmelfarb is also not telling everything. That you can take into account in determining not only what his relationship was to Mr. Ormont and what part of that money was his and what he got, but you also can take that into account in determining willfulness. Willfulness is a very important term here, as his Honor will tell you

more about later. But bear in mind these little indications of willfulness. It doesn't say on his return that he is a co-partner, it says here that his employer is Sam Ormont, doing business as Acme Meat Company.

And it also reports in that return that his income is in a certain amount, the amount that I read to you, and shows that the tax is \$656, which is made up apparently part in cash payments on estimated tax and part by being withheld. [1470]

Then there is also the return of Mrs. Himmelfarb, who of course is not involved in this case, she is not a defendant, she is his wife, and as you know she gets half of his income, as you ladies probably know very well, that you are entitled to half of the income of your husband. And she reports a certain amount of money as one-half of the community property of her husband. So that her return is predicated on what Mr. Himmelfarb—and if I say Ormont in this connection I always mean Himmelfarb because I am talking about Himmelfarb; this only deals with Himmelfarb—that shows the amount he paid, as we charge, the amount that he reported as we charge.

Now the only problem that exists is, did he have any more income? Did he have this extra income which we say he did have and which he should have reported?

Well, as to that the evidence is simply this: First they are co-partners, but he didn't say so on his return. We have to get Mr. Gorgerty. He tells you what happened. You remember Mr. Gorgerty, and the policy itself. That you can examine.

Then we have this revealing document known as the fiscal year return. That is Government's Exhibit No. 6. That says right on its face that it covers the calendar year 1944, or fiscal year, and then it shows that it covers the year beginning May 1, 1944, and it runs right through to April 30, 1945. Now that May 1st is just about the same time as this [1471] policy was issued. You will remember this endorsement bears the date of May 20, 1944, so that at that time they are co-partners, doing business as Acme Meat Company.

And you have this return again, the return on its face purports to be a return for Sam Ormont and Phillip Himmelfarb. It shows miscellaneous enterprises, and they give the address, Imperial Highway and Garfield Avenue, South Gate, California, and there again—and this I am offering against Mr. Himmelfarb, the same return—miscellaneous return, doesn't say what, doesn't say where, doesn't say a thing about it, \$71,383.

Any deductions? No deductions. All nice clean neat profit.

And if you turn a few pages you will find where it shows you how it is split up, 50 per cent to Sam Ormont, \$35,694 and some cents, and 50 per cent to Phillip Himmelfarb, \$35,694 and some cents, prepared by Mr. Malin, filed as I said before on May 24th. [1472]

In connection with this return you remember that an accountant was put on the stand by Mr. Katz, and he had some figures and he was using some schedules, and you will remember he was hired just

the day before, and you remember he testified—I think when I asked him—whether he got any information from the defendant Himmelfarb, and he said no, the only information he had was what is shown on the face of these documents, this income tax return which is the fiscal year return, the so-called fiscal year return, plus the income tax return of the defendant himself. And you remember that that accountant—I think his name was Kibbee—Mr. Kibbee was a very nice gentleman. He also has nothing to do with this case. I submit to you that his testimony has less to do with the case than he has, because his testimony is simply a computation of which is shown on the face of these things, but in one respect it is very important, because Mr. Kibbee allocated, their own accountant, their own case, allocated this money to show what part of it was earned in 1944 by Mr. Himmelfarb, and that was somewhere around \$11,000 or \$12,000 in addition to the amount reported.

Now what further proof do you need as to how much money was earned in 1944? Their own accountant comes in and tells you. He can figure *the out* from these documents himself. We don't have to do any figuring at all. We don't have to put on anything. You don't have to figure it either. If it [1473] hadn't been for the accountant here you would have had to do that, you would have had to taken 8/12 of that fiscal year and the reason it is 8/12 is because it starts on May 1st, so that makes it from May 1st until December 31st a period of eight months in 1944, and then there are the four

months in 1945. So to determine how much it will be in 1944 you should take 8/12 of the amount reported since that is the period it covers. But you don't have to do that, and I won't ask you to go through that, as I have suggested you might go through these others, you don't have to go through these reports at all because Mr. Kibbee told you what that sum was, and that sum is almost the same as that which we claim in our indictment was the additional income for that year. All Mr. Kibbee can do is just allocate and compute.

In addition to that, which on its face, as I said, and through Mr. Kibbee's testimony showed, how much money they had there is the fact that they are partners and the fact that his return, Himmelfarb's return, doesn't show that they are partners, again concealing a fact of that type, if you find that it is concealing a fact, if you find that they were partners from Mr. Gorgerty's testimony and the policy itself, you can take the fact that that was concealed from his return to account, you can take that into account in determining whether or not Mr. Himmelfarb in failing to report that money did so willfully, as we charge. You can take that into [1474] account in determining his intent.

Of course Mr. Himmelfarb, just as well as Mr. Ormont, filed a fiscal year return six days after the investigation started. They both filed them together. It is the one document. They both went to an attorney and then the attorney took them to Mr. Malin, the accountant, and then Mr. Malin prepared all these things and got together these sched-

ules which are Government's Exhibits 50-A through D, which you can examine, and he rushed that thing in.

I ask you again to take into account, when you are considering the question of willfulness, the question of whether there is any attempt to evade and defeat, the question of whether there is any concealment, take into account this strange fact that just as soon as an investigation starts they rush to a lawyer, they hire and get an attorney, as he testified here, and that attorney was retained for both Mr. Himmelfarb and Mr. Ormont, and the attorney gets an accountant, and then the accountant does the computing and in they come, six days after the investigation started. Doesn't that show anything as to what they were doing before the investigation started? And doesn't that tend to show to you as reasonable men and women what they would have done if the investigation hadn't started on that date?

If there was nothing to hide, if there was no problem, why didn't they go to an accountant and state, if they wanted [1475] to add on, and why do they need an accountant to put down on a form miscellaneous income \$71,000? If you had a lot of deductions and subtractions and things like that I probably would get an expert, but when you haven't got anything to deduct, all you have to put down is how much income you got, and all the accountant knows is what you tell him, why do you need an accountant? [1476]

Why do you need an attorney? Why do you need anybody to tell you anything that is open and aboveboard? Why not just do it yourself? No, they went to an attorney; they went to an accountant, and Mr. Kibbee himself—this was rather amusing, because he was supposed to be an expert—he couldn't find some of the money unaccounted for, with his own computation. He couldn't figure it out, when he knew all the facts from the basis of the documents himself. Were there some more facts? Mr. Kibbee could not tell you about some small sums.

. Now, besides what Mr. Kibbee told you, as to how much money got on the 1944 income, you have those documents which Mr. Malin filed. Let me read you this letter, which was filed, and which was signed by Phillip Himmelfarb, and listen, not only to what I say, but try to keep in mind what is being stated here, and how it is being stated. Here is a letter he sent in addressed to Mr. Donald Bircher, Special Agent, Federal Building, Los Angeles, California.

“Dear Mr. Bircher:

“In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total.

“This record is accurate to the best of my knowledge and belief. No other records were kept.” [1477]

Bear that in mind, ladies and gentlemen, when you listen to his Honor's instructions, as to what record you have to have to have authority at any time to file a fiscal year return.

"No other records were kept. All of the money received is represented by the total reported.

"Respecting the division of the profits:

"You ask if we divided the profits weekly, monthly or at the end of the fiscal year. In answer to that, there was no set time for distributions. Distributions were made at various intervals.

"The total amount I received" ——

This is signed by Phillip Himmelfarb——

"was \$35,694.42. This represented the total amount received by me and there were no expenses.

"Respecting your inquiry whether the total reported was both the gross and the net, the answer is yes. This represented both the gross and the net amount.

"Very truly yours,

/s/ "Phillip Himmelfarb."

Then he files an affidavit under oath, subscribed and sworn to by Phillip Himmelfarb. I will read you this affidavit. When you listen to this, remember the testimony of Mr. Gorgerty. Remember that document; that insurance policy, and whether, in

order to protect themselves, they told Mr. Gorgerty [1478] what relationship they bore, who they were, and how they were operating the business. This is under oath.

“I, Phillip Himmelfarb, being first duly sworn and being of lawful age, depose and state:

“That during the year 1944 I was an employee of the Acme Meat Company;”

I was an employee of the Acme Meat Company. This is being sent to the Bureau of Internal Revenue, when they are inquiring about his income. That's what he tells them; and that's what he testified to, that on the 27th day of July, 1945, he was an employee. He said:

“That during the period commencing with May 1, 1944, and ending on April 30, 1945, I received from the joint venture, which I have engaged in with Samuel Ormont, the sum of \$35,964.42; Samuel Ormont received from this joint venture a similar amount;

“That the total amount of this aforementioned income received by me was not reported by me for the calendar year 1944 but was reported in full in a joint venture return for the period commencing with May 1, 1944, and ending on April 30, 1945.”

And that, in connection with that, and proof of the fact that he got the money—some people might say they got the money; or that they might not have got it—I submit, this document shows what his

assets are, how much he was worth, how [1479] much he got, exactly as the Government says he really got.

There has been filed here 58, Schedule 50 B, which bears the signature of Phillip Himmelfarb, which tells you what he was worth; how much money he got. There is no doubt of the facts; he got none whatsoever. Here is set forth what he is worth, and where the money went, and then he says something, which is somewhat peculiar. If they are operating as a joint venture, and the joint venture is the only joint business, as he says, they are in, let us assume the claim is not that they are partners, he has a statement:

“In addition to this $\frac{1}{2}$ of the profits for the year 1945 accrues. On April 30, 1945, this has been tentatively estimated at \$9,561.06.”

I submit to you, ladies and gentlemen, with reference to Mr. Himmelfarb, there can't be any possible doubt of the fact that he received that money in 1944. He says so himself. His accountant says so. He figured it out for him. There isn't any doubt, so he received just about the same sum we say he received.

Besides that, you have in evidence here the bank records of Mr. Himmelfarb, which show you how much money got into his bank account. In addition, of course, you have all of the circumstances, which I have described to you, with reference to the preparation of the various documents which were marked as part of Government's Exhibit 50. No

books, he says, were kept [1480] of that enterprise. That enterprise consisted of some enterprise Mr. Ormont was engaged in; some joint venture. He says so. He says it under his own signature, his joint venture fiscal year return, and this money came obviously, as this signature to this return shows, from the same source.

I won't go into the source. Ask yourselves what those sources were. I am not going to spend any more time on Phillip Himmelfarb. I think that on the basis of the evidence before you, upon the basis of the fact that he reports additional income for 1945 on a fiscal year return,—all the circumstances concerning the preparation of the fiscal year return, when they do it, how they do it, all those considerations, together with the testimony of their accountant, Mr. Kibbee, together with the testimony of Mr. Malin, together with what was said by Mr. Ormont, by Mr. Himmelfarb in his affidavit, and together with what he says in the letter; and together with the fact that he still claims under oath the fact that he was an employee, when you have seen that he was a partner,—I think that is enough to show that Mr. Himmelfarb too had this unreported income; that that income was earned by him in 1944; earned by him, not as a separate special enterprise, but as a part of their joint venture, and that Mr. Himmelfarb wilfully and deliberately failed to report that income on his tax return.

That he wilfully and deliberately, as charged in Count 2 of the indictment, attempted to defeat and evade a large part of [1481] the income tax due and

owing by him to the United States for the year 1944, by preparing, and causing to be prepared, filing and causing to be filed, with the Collector of Internal Revenue, a false and fraudulent income tax return, wherein he understated his income for that year, which, as I told you, he understated by about \$12,000.00.

That is the Government's case against Mr. Himmelfarb. I submit, upon the evidence, and those pieces of evidence which I have outlined to you, it is clearly indicated that Mr. Himmelfarb was doing precisely what he is charged in the indictment with doing, and that Mr. Himmelfarb is guilty of the offense charged in Count 2, just as Mr. Ormont is guilty of the offense charged in Count 1 of the indictment, as against him.

The Court: Mr. Katz.

Argument in Behalf of Defendant Himmelfarb

Mr. Katz: May it please the Court, counsel, Mr. Strong, and ladies and gentlemen of the jury:

The first jigsaw puzzle that I must unravel, is one created by the condition of the exhibit at this time, and I will try to take up those that I want to refer to in this case.

You ladies and gentlemen of the jury have patiently sat here and attentively listened to much talk, but little evidence, in a little better than three weeks, since his case commenced, and I know that your duty of sitting and serving here as jurors [1482] devolves upon you by reason of the fact that you are citizens of a vital and living Democracy,

and it was lightened to some extent by the fact that the court room was presided over by one possessed of a very cheerful personality and disposition, and particularly a keen sense of humor. At least, I find that to be true of my stay in the court room up to this time.

Even after three long weeks in this court room I believe that I have eventually come to the conclusion that the prosecutor is Strong, but his case is weak, and as against the defendant Himmelfarb it actually is non-existent.

He told you about jigsaw puzzles and the pieces that go to make it up, but insofar as the case against the defendant Phillip Himmelfarb is concerned, he not only did not have the jigsaw puzzle, he not only did not have any pieces; he did not even have a box they should have been in. He came into this court with the statement of what he was going to do, and in the argument that he has made has referred to some exhibits, and it now becomes my duty to review with you the evidence in this case; to go over the testimony and the exhibits that are here before the Court, and when I talk about this case, ladies and gentlemen of the jury, I am talking about the case against the defendant Himmelfarb. That is the only evidence that I am concerned with in this case; the evidence introduced against him.

In the determination of the guilt or innocence, you as [1483] jurors, under your oath. and under the instructions the Court will give you, have the solemn obligation of determining that guilt or innocence upon the evidence that has been introduced

in this case in this court, in this record, against the defendant Himmelfarb, and not upon any statements Mr. Strong makes to you, not upon any statements I make to you, and not upon any evidence that may have come into this case that didn't come in against the defendant Phillip Himmelfarb.

I realize it is a most difficult task to sit in a court room, as you have done, and have heard the evidence come in; very little against one defendant, and the rest against someone else, and you should try in your mind to shut off the other evidence, and determine the case solely upon the evidence that is before you as against the defendant Phillip Himmelfarb, which, under your oaths, and under the instructions you must do. And I believe that a review of the record will help you determine just exactly what that evidence is, and for that reason I have gone over the transcript, and I think you can see from the stack on my desk, which is only a part of them—I have two here—we have written books in this same court room in the three weeks we have been here.

I have gone through these transcripts, so that we may have in mind just exactly what the evidence is, because this case, like any other case, is not to be determined upon conjecture, speculation, surmise, guesswork or suspicion or [1484] innuendos that may be made in argument to you; but must be decided upon the evidence before you. And what is that evidence? It is very interesting really, and I believe you are going to find it so.

The first witness in this case was Mr. Albert D. Allen. He was the man you recall, who was called down from the Collector's office, who found it to be very difficult to get a truck to bring down the voluminous records which he would have to do, and as a result of stipulation between counsel as to what amounts were paid in connection with the taxes, he was excused, and did not testify. So I am going to eliminate him, because he did not actually testify.

Consequently, the first witness then becomes Mr. Baizer, who identified the bank record with respect to Mr. Ormont only, and we must eliminate him. There is no evidence with respect to the defendant Himmelfarb.

The next witness was James E. McClung; the witness in the case, who identified the bank records respecting Sam Ormont only. We eliminate him.

The third witness in the case was Albert H. Jehl. He identified bank records respecting the defendant Ormont only. We must eliminate him.

The next witness in the case was Thomas G. Miller. He identified some stock records of Merrill Lynch, Pierce, Fenner & Beane, respecting the defendant Ormont only. We must [1485] likewise eliminate him.

The next witness was Hugh R. Pingree. He identified records of the Bank of America, 3rd and Chicago Branch, of the defendant Phillip Himmelfarb. Until we get up to the point of Mr. Pingree, we have eliminated four witnesses entirely. There is no evidence from them whatsoever.

We get to Mr. Pingree. What does he do? He comes into court and says these records are records of the bank respecting Mr Himmelfarb's account. He does not testify with respect to any matters contained therein whatsoever. He merely identifies those records.

The sixth witness in the case was Mr. Link, who spent some little time here. The only testimony that Mr. Link gave that is in the record against the defendant Phillip Himmelfarb is to the following effect, and I am giving you in substance the total of that testimony.

He testified that he saw the defendant Himmelfarb performing work on the premises of the Acme Meat Company, during 1944 and 1945; that he saw him make out invoices to customers when they came there; that he would compute the amount due the customer; that he made another computation, and entered the amount on a list, which he kept in the desk drawer; that he saw him sell beef and meat; that he audited payroll checks, and that he checked them against the books, and in the checkbook.

That the payroll checks were issued to Phillip Himmelfarb. [1486] Link never saw Phillip Himmelfarb receive any sum of money in connection with the list which contained the names of customers. Sometimes the handwriting was Himmelfarb, and sometimes the handwriting was Ormont. That he did not record any amount from the list on any books of the Acme Meat Company. That the profits of the Acme Meat Company for the year 1944 were credited to the account of Sam Ormont.

That was the sum total of the evidence that we have in this case from Mr. Link. And let us take that evidence on all of the Pingree identification, which makes, up to this point, the sum total of the evidence in the case.

I shall refer to exhibits when I have pointed out the witnesses that have come here. Our next witness is Mr. Eustice, and he was here a long time. As a matter of fact, he was here so long I thought this was going to be a court of Eustice, instead of a court of justice. But, nevertheless, during that long period of time he was here, I think at least one-third of these volumes represent Mr. Eustice's testimony.

There isn't one word of Mr. Eustice's testimony against the defendant Phillip Himmelfarb. He must be eliminated entirely. You will recall that, with respect to each of the witnesses that I have mentioned up to this time, including Mr. Eustice, there was no cross-examination except—it wasn't actually cross-examination—except that I did, with respect to Mr. Eustice, at the outset of his testimony, take him on [1487] preliminary or voir dire examination with respect to his record, to establish their incompetency; and the reason that there was no cross-examination with respect to the previous witnesses up to this point, and Mr. Eustice too, is because no direct testimony had come in from any of those witnesses against the defendant Himmelfarb. Consequently, there being no direct testimony, there was nothing with respect to which he could or should have been cross-examined.

The next witness in the case was Mr. Gorgerty. That was the insurance broker. The sum total of Mr. Gorgerty's testimony, in substance, was that he had written a policy for Mr. Himmelfarb; that Mr. Himmelfarb had called him in for the purpose of having that policy transferred. That he introduced Mr. Ormont to him as his partner, and asked him to transfer this policy to the Acme Meat Company, showing himself and Mr. Ormont as partners.

We add that testimony to what we have already in the case to make up to this point the sum total of the evidence against the defendant Phillip Himmelfarb. I shall go into the matter of those exhibits in a bit.

The next and the ninth witness in the case was Samuel Phoebus. He testified against the defendant Ormont only. Not one word of his testimony is against the defendant Phillip Himmelfarb. We must eliminate him.

The tenth witness in the case was Frank Smith. He testified against the defendant Ormont only. Not one word of testimony came in as against Phillip Himmelfarb. As a matter of fact, that was the witness, if you will recall, who started to give his testimony and there was a stipulation as between Mr. Robnett and Mr. Strong that eliminated the necessity for the testimony. Consequently we eliminate Mr. Smith.

The next witness in this case was Mr. William Malin. He is the eleventh witness. The only testimony that Mr. Malin gave that came into the case as against the defendant Phillip Himmelfarb is to

the following effect: that he sent the letter and the affidavit that Mr. Strong read to you to Mr. Bircher, that he saw Mr. Himmelfarb sign his signature to the letter, that the information on the affidavit and letter was obtained from Mr. Himmelfarb; also the statement appearing in the net worth statement, the facts appearing in the net worth statement; that he prepared Exhibit 6, that the [1489] information with respect to the joint venture, the miscellaneous enterprises, came from the attorney, that the information respecting the income came from the attorney Mirman, that the information respecting the division of the income came from Mr. Mirman and Mr. Ormont. That is the sum total of Mr. Malin's testimony against the defendant Phillip Himmelfarb. We add that to the previous testimony to make up the sum total of the evidence upon which you must, under your oath and under your instructions of this Court, consider and decide this case.

The next and twelfth witness, and the last witness presented by the government, was Donald Bircher, and Mr. Bircher testified in the case as against the defendant Ormont only. We therefore eliminate Mr. Bircher.

The sum total then, ladies and gentlemen, of the evidence in this case that we have is that bit of testimony from Mr. Link, which in answer to questions put by the Court establish the fact, in so far as Mr. Link was concerned, that there were payroll checks issued to Mr. Himmelfarb and that Mr. Himmelfarb worked at the Acme Meat Company.

So far as the witness Gorgerty is concerned, whatever the reason may have been for requesting him to transfer the insurance, whether it was better or easier to transfer to the Acme Meat Company on the basis of a partnership than it would have been on any other basis, the only testimony there [1490] is the statement that Mr. Himmelfarb introduced Mr. Ormont as a partner.

It is not a crime, it certainly doesn't constitute the crime of evading income tax, to receive payroll checks, to work at the Acme Meat Company or any other place, nor is it any crime, nor is it a crime of evasion or attempting to evade income tax, to ask an insurance broker to transfer a policy from an individual to two individuals, whether as partners or otherwise, whether it be true or untrue, that they are or are not partners. We cannot spell any crime out of any of the testimony up to this point.

And certainly the testimony of Mr. Malin with respect to the letters and the net worth statement, that testimony whether added to or taken by itself, doesn't establish any kind of a crime, whether it be evading income tax or anything else, and we of course here are concerned with this problem: the burden is upon the government to prove to you beyond a reasonable doubt and to a moral certainty that the defendant committed the crime charged in the indictment.

Now let me take up the exhibits, if you will, please, because you will find upon examination of the testimony in this case that no semblance of an offense has been shown, and certainly not the type

and kind of evidence or testimony that should or could convince any reasonable person beyond a reasonable [1491] doubt as to the commission of such an offense.

I call your attention first to Exhibit 4. That is the income tax return filed by the defendant Phillip Himmelfarb for the year 1944. No one has come into this court, not one witness has uttered one word, that the information appearing on this return is not true or correct. There is nothing on this exhibit that indicates that the information thereon is not true or correct. If a mere return such as this spells out a crime then that crime must appear in every income tax return that is filed because it is no different a return than the returns that are filed by individuals reporting on a cash basis and on a calendar year basis. There is no crime there. So we add it to the other testimony, add it to the other evidence, and we have no crime there.

Exhibit 5 is a calendar year return for Mrs. Himmelfarb for the year 1944, the same type and kind of a return that husbands and wives filing separate returns file year after year. Not one word of testimony has been uttered in this case that these figures are not true or correct. Add that to the rest of the testimony and we have no crime, no offense of any kind or character.

The next exhibit is Exhibit 6. That is the joint venture return. If you will look at it, it is headed up "Partnership Return of Income for the Year 1944." It sets forth joint venture income. Has any witness in this case taken the [1492] stand and ut-

tered one word as against the defendant Phillip Himmelfarb that the information set forth herein is not true or correct? Who was that witness that uttered that one as against the defendant Phillip Himmelfarb? It hasn't been said. It hasn't been uttered. No such witness was presented in this case. And this return is an information return, and you will be instructed that there is no income tax due and payable in connection with such a return. This is filed as a matter of information only. It is filed to disclose the individuals to whom income is distributed. The income that is payable in connection with an information return is payable by the joint venturers or partners to whom distribution is made in the calendar year following the calendar year in which the fiscal period ends.

This sets up a fiscal period of May 1, 1944, to July 5, 1945. Therefore the fiscal period ends in the calendar year 1945. Therefore the tax due by the partners or joint venturers need not be reported and paid by them until they file their personal calendar year return for the year 1945 on or about March 15, 1946.

Add that, if you please, to the rest of the testimony in this case that has come in against the defendant Phillip Himmelfarb and you must decide it upon the record, upon the testimony in the case as against him, and you have no crime, you have no offense. [1493]

Now ladies and gentlemen, you of course can't go beyond this record and consider any other testimony. It must be based upon what is in the record.

Mr. Strong, at the outset of his case, made an opening statement. I would like to refer to that. He said to you in his opening statement when he first addressed you:

“As to count 2 we will show that Mr. Himmelfarb filed an income tax return covering the year 1944 and he also stated what he said was his income and stated what he said was the tax. Now the only thing that is difficult about that, the only thing that the government says is wrong with that, is that he didn't tell you the whole story on that return. He left out a lot of income. We are going to show you this extra income. We are going to show you that there was extra income and that it was the kind of income on which he had to pay a tax, and he had to report it and he didn't do it. That is all there is to it.” [1494]

Where in this record, ladies and gentlemen, as against the defendant Phillip Himmelfarb is there any evidence that he didn't tell the story on that return? Where in the record in this case as against the defendant Phillip Himmelfarb is there the testimony of any witness, is there any evidence of any kind, that the defendant Phillip Himmelfarb left out a lot of income? What witness, if you please, testified one word to that effect? What evidence is there in this case that has proven to you beyond a reasonable doubt that there was any additional income that was not reported in the 1944 return, for the year 1944? By what witness and with what evi-

dence has he shown to you that there was extra income earned in 1944? Has any witness taken the stand that the prosecution has called that so testified? Not one word has been uttered.

Mr. Strong knew that, and what did he do? He referred to the testimony of Mr. Kibbee, who was called in by Mr. Himmelfarb, and there is an interesting story in connection with that, and this is what it is: In my opening statement, ladies and gentlemen, I said to you:

“I believe that the evidence will show that the defendant knows no more about the intricacies and complexities and ramifications of income tax returns than you and I * * *”

And I went on to say that “consequently like most of us [1495] he goes to bookkeepers and auditors and so-called tax experts.”

That evidence is here before you. If you will take a look at these exhibits you will find—well, take Exhibit 4 for instance—there appears on it a statement, “Signature of person other than taxpayer or agent preparing return,” and there is a signature that appears to be W. Moody on that return which establishes it is someone other than the defendant Himmelfarb who prepared that return.

Looking at Exhibit 5, the same thing precisely is true. That is established by the exhibit itself.

Looking at Exhibit No. 6, that is the one that the testimony established that Mr. Malin prepared, and there is in connection with that a statement that it was prepared by the accountant.

The same thing is true with respect to Exhibits GG and Exhibit HH—every one of these returns show on their face that they were prepared by someone other than the defendant Himmelfarb, other than the taxpayer.

But going on beyond that, I had made the statement to you during the course of my opening statement:

“You know that as you pay the taxes increase depending upon the income bracket in which you fall, and that the reduction of the 1944 tax brings the amount to a lower point for 1945 than [1496] the addition of the same amount to the 1944 tax would bring him up in the way of bracket, and consequently under the Government’s contentions, and as I understand those contentions up to this point, on the basis of their own evidence it will show that there not only has not been a failure to pay but that the result is an overpayment of tax. Consequently a lesser amount was due in 1945 than was actually paid, a greater amount if the Government is correct would have been due in 1944 but the total amount for both years by the defendant Himmelfarb is less under the Government’s claims and contentions, the evidence will show, than the total payment by the defendant Phillip Himmelfarb.”

Now I said in my statement that I would prove that by the Government’s own witnesses. Well, ladies and gentlemen, I must confess now that I was

mistaken. I assumed that when Mr. Strong made his opening statement that he had some testimony to back up what he said, and I knew that if he put any witness on the stand that would testify with respect to these returns against the defendant Himmelfarb that I could by that witness' own admissions prove the fact that I brought Mr. Kibbee in to prove. But, ladies and gentlemen, the prosecution never brought in such a witness. But to keep the statement [1497] and promise made in my opening statement to you I called Mr. Kibbee into the case, and when I called him into the case I was in the position that there wasn't any evidence in this case against the defendant Himmelfarb respecting any amount of income, so we went to their indictment, which merely is a charge and does not prove anything—it isn't evidence—and we took from their indictment the amount that the prosecution tried to establish and never did and couldn't establish, and using first that figure Mr. Kibbee made some calculations, and he assumed for the purpose of those calculations the figure that the Government alleged but has never proven in this case.

And what is the result?

“Q. What is the total amount of the tax as recomputed by you upon the basis of the net income as shown in the 1945 return less the amount of \$13,641.11 as allocated to 1944?

“A. The total tax is \$1881.85. .

“Q. What is the total amount of the tax for the years 1944 and 1945 as shown by the re-

turns for those years as filed by the defendant Phillip Himmelfarb? A. \$8891.97.

“Q. What is the total amount of the tax for the years 1944 and 1945 as recomputed by you upon [1498] the addition of the \$13,641.11 to 1944 and the deduction of the amount from 1945?

“A. The total recomputed tax is \$7725.78.

“Q. Mr. Kibbee, what is the difference in dollars and cents between those two figures?

“A. \$1166.19.”

He was then asked:

“Q. With respect to the returns for 1944-1945 as filed, does that amount which you have just given as a difference represent an overpayment or underpayment?

“A. It would result in an overpayment.”

Having gone and taken the figure from the indictment, which has never been proved, has never been established; no figure has, of any kind, and placed before this Court, no matter how it were calculated, we have Mr. Kibbee assume, just for the purpose of calculation from a breakdown based upon the apportionment, he said, in 1944, to the total income, and in 1945, that too, upon a recapitulation, resulted in an overpayment.

Mr. Kibbee never testified, nor has anyone testified, that any amount of money was actually earned in 1944; and there is no such evidence before you in this case. But to establish the statement that he told you would be established, and it would be

established by Government witnesses who would testify to income, but there is no such testimony, and we brought in a witness to prove it. And that, ladies and gentlemen, is the fact with respect to that matter, and there isn't such a thing in this case as Mr. Kibbee having established and proven any income for 1944.

As a matter of fact, Mr. Strong said, all you are doing, is assuming a figure? Yes.—You don't know of your own knowledge? Obviously they were assuming figures from the indictment, in one case, and on an apportionment in the other one.

Ladies and gentlemen, the defendant in this case is accused of a grave charge, and in determining that you must, and can [1500] only look to the record, and to the instructions of the Court. And the Court has repeatedly instructed you during the course of the trial, that the evidence was admitted as against one defendant only, and you must not consider it as against the other; and that follows with you, and carries through into your deliberations in the jury room. And consequently it will be necessary for you to determine where in this record is there a record against the defendant Phillip Himmelfarb, that convinces you beyond a reasonable doubt, and to a moral certainty, that he prepared and filed a false and fraudulent return?

Has there been one word of testimony in this case, from any witness, that the defendant, Phillip Himmelfarb, prepared a false and fraudulent return? Who is that witness? Where and when did he testify? It does not appear in that record. Where in

this record is there any evidence against the defendant Phillip Himmelfarb that can convince you beyond a reasonable doubt, and to a moral certainty, that his net income for the year was \$17,752.65, and that the tax thereon was \$5,843.91, as charged in the indictment, or any sum substantially similar to that?

Has there been one witness that has come into this case and uttered one word to the effect that Mr. Himmelfarb's income for the year 1944 was as is charged in the indictment, \$17,752.65, or any other sum; or has anyone testified to any [1501] amount whatsoever? It has not been in this case, and it isn't in that record.

Has anyone testified in this case—has there been one word uttered, that the tax due for the year 1944 actually was \$5843.91? People cannot be convicted upon conjecture, guesswork, surmise, or suspicion.

Where is the evidence that will prove those things? Where in the record is there any evidence that the defendant Phillip Himmelfarb concealed, or attempted to conceal, from the Collector, or any other person, his true and correct net income for the year 1944? Has there been any witness that uttered one word to that effect? Did Mr. Eustice do it? Did Mr. Phoebus do it? Did Mr. Bircher do it? Did anyone else do it? The answer is, no, there has been no such testimony, and it is upon the evidence in this case that you must decide the case.

Has there been any evidence before this Court that can convince you beyond a reasonable doubt and to a moral certainty that the defendant Himmelfarb concealed; or attempted to conceal, his true and cor-

rect gross net income? Where is that witness? When was that word uttered? There isn't any testimony. There isn't any evidence that the defendant Phillip Himmelfarb filed a false and fraudulent return. There isn't one word of testimony or evidence in this case that he evaded, or attempted to evade income tax for the year 1944, or any other year.

And where [1502] in this case has there been one word of testimony, where in this case is there one bit of evidence, that the defendant, in connection with these things, which the Government has charged—and he is charged only with attempting to evade income tax; he is not charged with anything else; he is not here for any other purpose—there is no testimony as to Phillip Himmelfarb. And so, with reference to the matter of his income tax return, where is there any evidence or testimony that he did any act willfully, or attempted to evade his income tax?

Ladies and gentlemen, the charge in the indictment is that the defendant filed, on or about March 14, 1945, a false and fraudulent income tax return. The income tax return that is referred to in the indictment is Exhibit No. 4, the return upon which he shows an income of \$9223.48, which was divided between himself and his wife, Mrs. Himmelfarb. The defendant in this case is not charged with filing a false and fraudulent information return, which is Exhibit 6 in this case. That is not the charge. That is not the accusation. There is no offense predicated, or attempted to be predicated, upon that exhibit, or upon the filing of this return. It is only

Exhibit 4 which is, and could be, the basis of any determination by you, and upon that return, which is the return which is charged to have been false and fraudulent, are you convinced, [1503] beyond a reasonable doubt, from the evidence introduced in this case, from the testimony of the witnesses I have delineated for you, are you satisfied beyond a reasonable doubt and to a moral certainty, that the defendant, Phillip Himmelfarb, did file a false and fraudulent return? That he did so willfully? That he did it for the purpose of attempting to evade income tax?

And that is Exhibit 6, that information return, and is an information return to disclose, and legally, in so far as the case against the defendant Himmelfarb is concerned. There is not one word of testimony that that disclosure, in so far as he was concerned, and that the filing of that return, was not freely and voluntarily done.

And the fact that he has gone to an accountant to have it prepared—all of his returns have been, and I presume, ladies and gentlemen, that you have returns that are filed for you by an accountant. And the fact that he went to an attorney—and Mr. Strong would have you believe that they got an attorney for the purpose of concealing, hiding,—and I presume you people have gone to attorneys and your have transacted legitimate business. At least, I can say I have had clients come to me for that purpose, and I am sure Mr. Strong did too when he was in private practice, or if he hasn't, that they will come to him for the same purpose when he is in private practice. [1504]

You will be instructed by the Court that the law recognizes that it is proper and legal to avoid the payment of income tax by any lawful means. One cannot willfully evade taxes, but to avoid the payment of them by legal means is legal; it is proper and it is lawful. Irrespective of all other matters, you must be convinced beyond a reasonable doubt from the evidence in this record before you.

Now, this is my last opportunity to address you. I will not have an opportunity to say one further word on behalf of my client. Mr. Strong will make a closing argument. It is my request of you, ladies and gentlemen of the jury, that you analyze that argument, consider the reasonableness of it, and particularly check him to determine if he is going outside of the record, against the defendant Phillip Himmelfarb, in an effort to construct a case by argument which he was unable to do by evidence. And I believe that you are going to find it necessary in your deliberations to check yourselves, and ask yourselves: Now, are we considering evidence that did not come in against the defendant Himmelfarb? And you may find it necessary to check each other in that regard, because if you base your decision in the determination of his guilt or innocence upon any evidence that is not in the record and against him, your determination, obviously, is not, and cannot be in accordance with your oath and the instructions of this Court.

When you took your seats in the jury box you did so with [1505] the belief of the defendant's inno-

cence, based upon the presumption of innocence, which continues until you are convinced by the evidence in this case that he is guilty beyond a reasonable doubt and to a moral certainty.

Your oaths, and the instructions, require you to fairly and impartially try this case on the evidence presented against the defendant Phillip Himmelfarb. We have not the right, and we did not ask more of you, than that you do fairly and impartially, and determine the case against him upon the evidence in this case as against him. We have the right, however, to expect no less, because you will do your duty as jurors in this case, and because there is, upon the evidence and the record in this case, only one conclusion which you can come to as against the defendant Phillip Himmelfarb.

You must find him not guilty. Thank you.

(Here followed discussion outside the record.)

The Court: We start at 9:30 in the morning. Recess until 9:30. Remember the admonition. [1506]

(The following proceedings were had outside the presence of the jury:)

The Court: The additional instruction that was submitted, was that prepared by you?

Mr. Strong: No.

The Court: Do you have any objection to it? It seemed to me to be agreeable.

Mr. Strong: I haven't read it over. I also have a few additional ones that I will prepare tonight and bring in tomorrow.

The Court: We should have had them before.

Mr. Strong: I just saw things developing in the argument which I think ought to be covered.

The Court: I do not think so.

Mr. Strong: Well, your Honor, for example, Mr. Katz constantly refers to testimony as being the only evidence. I think there should be an instruction that not only testimony is evidence but other things are evidence. I think that ought to come from your Honor as a matter of law.

The Court: That is a general instruction.

There are two instructions that I thought I ought to add on my own motion which I thought about during the argument.

One is: "It must be kept in mind that this is not a civil suit to collect taxes in which you could decide the case by mere preponderance of the evidence, but the charges [1507] here must be proved beyond a reasonable doubt and to a moral certainty."

The other one is to add to Government's Instruction No. 5, after I tell them they are not to be concerned with the punishment which is a matter entirely within the province and is the responsibility of the judge, and the result of it in the event of a conviction: "Nor are you to be concerned with whether or not any tax which might be due will or will not be affected as the tax liability, if any exists, with appropriate civil remedies regardless of your verdict in this case."

Mr. Strong: I have no objection.

Mr. Robnett: That is agreeable, your Honor.

The Court: Very well. 9:30 tomorrow morning.

(Whereupon, at 4:40 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m., Friday, June 13, 1947.) [1508]

Los Angeles, California, Friday, June 13, 1947

9:30 A.M.

(The following proceedings were had outside the presence of the jury:)

Mr. Strong: I have another instruction, your Honor.

Mr. Robnett: I don't think it is proper to give it.

Mr. Strong: That instruction deals with the law. It tells the jury what the law is in regard to the taxes.

The Court: I don't think this is necessary. It may be subconsciously that conclusion is induced in contemplation of reading all these figures to the jury.

Mr. Strong: The Circuit Court has said the jury is to apply the law to the facts. I want to eliminate that by having your Honor tell the jury how much the tax is. The defendants are charged with attempting to evade and defeat a substantial portion of the tax.

Mr. Robnett: I think the instruction is very complete, your Honor.

Mr. Strong: There isn't any instruction what the tax is. I don't know why Mr. Robnett said that.

The Court: There isn't any instruction on that, but to read this to the jury would be almost meaningless. Perhaps an instruction can be framed.

Mr. Strong: May I reframe it, possibly during the lunch hour? [1511]

The Court: A short and simple instruction on it would be:

In the event that they find that the income was not reported as claimed by the Government, then the tax for 1944 would have been higher for that year than was paid for 1944.

Mr. Strong: Can we give an approximate figure of tax?

The Court: No. If you paraphrase what I said: It would have been substantially more than was paid for the year 1944; because it is charged that it was an attempt to defeat and evade. It is not to determine the precise amount of tax that was due.

Mr. Strong: Since the record shows the defendants objected to the giving of this instruction anyway, I will rephrase it according to your Honor's statement.

The Court: The reporter can write up my statement just now, and knock off several carbon copies and hand them to counsel. The jury can be called down now.

We will take a short recess.

(Short recess.) [1512]

The Court: United States vs. Ormont and Himelfarb.

Mr. Strong: Ready.

Mr. Robnett: Ready.

The Court: Usual stipulation?

Mr. Strong: Usual stipulation.

Mr. Robnett: Usual stipulation.

Mr. Katz: Yes, your Honor.

The Court: Mr. Robnett.

Argument in Behalf of the Defendant Ormont

Mr. Robnett: If your Honor please, counsel, ladies and gentlemen of the jury: I know you will all be thankful to know that this is about the last time you are going to hear from me and you will be able to go home and stay there as far as I am concerned.

This case has been a long case, I know, and I have been blamed for it, I see. I don't know whether I was willfully blamed or otherwise, but the question of willfulness will be a very important matter in this case, not necessarily on the matter I am going to mention to you now but it is an important element, and I am going to mention this because I hope that there was no prejudice or anything intended. I don't believe there was. Anything I may say with regard to any of the witnesses, I don't think there is anything personal. I am trying to call it as I heard the evidence, and let the chips fall as they may. The same as to counsel. I am [1513] very fond of Mr. Strong.

Yesterday, however, he saw fit, if you will remember, to tell you what a long trial we had had and the long cross-examination that I put on witnesses here and all of the evidence that I had put in, and said to you, "What has that got to do with this case?"

Well, I don't know why that was brought up. You do know that I was long in cross-examination. I am representing a man here who has a serious charge against him. I felt it was my duty, and I make no

apologies for the time I devoted to doing the job as I thought it should be done, according to my little ability. Maybe someone else would have done it quite differently. I don't believe that Mr. Strong in doing that wilfully intended any prejudice at all. I don't believe he did.

You know, we do lots of things in this world and it may be that they are not just right, but if we don't wilfully intend wrong with them then we are not to be punished. So it is with the defendant Sam Ormont in this case. He isn't more than just a human being like you or me. I am not going to stand up here and tell you he is a little god, or anything of that sort; I am going to tell you though that he is a good citizen. He makes mistakes probably, we all do, that is human; he wouldn't be here, I don't believe, if he didn't, if he was perfect. But the question that is important, and [1514] all-important, in a case of this sort is the question of willfulness, if you did anything or omitted to do something. Was it willful and with a bad motive? That is important here.

Now I am going to take up with you first a little bit that I think should be cleared up before proceeding with the elements of the issues at hand. There were, as you know, originally four counts against my client, four charges. Mr. Strong yesterday in calling your attention to the long cross-examination and to a lot of evidence—he had a lot of checks and he said, “What has that to do with this case?”—he was correct. It doesn't have anything to do with this case to date. The day before

yesterday and the days that preceded that it had a lot to do with the case. There were three other counts in this case against my man. Those counts, as you know, my client stands acquitted of those. Therefore that evidence as to those years 1942 and 1943—and that was the long evidence—that evidence has nothing, as I see it, to do with this case at all. You are trying a question now as to 1944. Did Mr. Ormont willfully, intentionally, feloniously and wrongfully, for the purpose of evading tax, attempt to do something that would constitute an evasion of tax that he owed. You would have to find that from the evidence, if you find him guilty in this case, and I think I can show you that you couldn't possibly follow your oaths and the instructions of the Court and find him guilty on that count. [1515]

Now, let us go back to another matter. Counsel said there were a lot of things shown in the bank records of big deposits. I expect there are. I don't believe any human being can transact that much banking business, that is shown on these ledger sheets, and not make a lot of deposits. I wouldn't be surprised, if you took the time, or wanted to take the time to check it off, that you would find more than a million dollars passed through those accounts. It doesn't mean it's profit; it is income.

Counsel, if you recall, brought in Exhibits 24 and 15, I guess it was,—just a few pages of the account. You recall I said: Bring them all. There they are. There is nothing there never has been, in my mind that the defendant, Sam Ormont, kept from this jury, or kept from the officers of the Internal Rev-

enue Department any books or records. He has never tried to secrete anything. He puts his money in the bank, where they can find it. He knows they can find it. You know these officers, if they want to find out what you have in the bank, they have got the right to find out; and they found out. So, he wasn't hiding it. It was all open and aboveboard.

They take up the witnesses. Mr. Strong mentioned Mr. Eustice. He said he had made a thorough check of all the books and records, bank or otherwise. Mr. Eustice did not say that. If he did at any time, I didn't hear him. He didn't say that on cross examination, and particularly when his Honor, [1516] the judge, took these bank records and said to Mr. Eustice: Do you mean to say that you checked each and every one of these items, back and forth, as to wherever they came from or went?—Well, he finally said, the large ones. Enough to convince me.

You are not here to convince Mr. Eustice. You are trying a case here, and you have got to be convinced yourselves, from the evidence, beyond all reasonable doubt, and to a moral certainty, of these things. That's why we are here.

He said: Well, don't like \$250 or \$300. I didn't trace those out. No. The fact of the matter is he finally used two items in 1938, one for \$2,000. I didn't trace that out. And another for \$1850. I didn't trace that out.

A thorough check of all the books and records, as Mr. Strong says? Is that thorough? No. Yet his entire testimony in this case was based upon the theory that he had, by a process of elimination,

checked off all those things, and said they belonged in that category, and it leaves us with this situation, and my answer is that Mr. Strong has failed to account and report large sums of income or how to find out where he got them.

One of those, in 1943, they charge him with \$18,000. Has counsel proven that? No. There is an acquittal on that. In 1942, a great many thousands of dollars. An acquittal on that. 1944—he finally comes down to 1944 and says: Now, [1517] we will stand on this. He charges a very large sum.

He told you yesterday: We don't have to prove all the income we charge. That's right. Surely, his Honor will instruct you that that is correct, but I am quite certain that his Honor will instruct you, ladies and gentlemen, that when the Government comes in here, and charges one of their citizens with a crime like that, and says: You have been guilty of sequestering, defeating, and evading your income tax, or a large part of it, a large part of your income,—I have forgotten the exact amount they claim in this particular count; I think maybe \$30,000; No, the tax—it was some twenty thousand odd dollars,—the law says that they must prove substantially what they have alleged. They don't have to prove it to a cent, or even to a hundred dollars, where it is in thousands, maybe, but they must prove substantially what they have charged. They can't come in here and say: Well, we made a mistake. It was not half that much, but we still want to convict you. That is not fair to the defendant. He has a right to know what he has to meet, and to meet that.

They say: Well, there is some evidence in the record by Mr. Link, the former bookkeeper. There is. But the evidence of Mr. Link, taken altogether, does not prove it to you, as I see it.

Mr. Link has been the bookkeeper for Mr. Ormont for some [1518] 13 or 14 years. He only went there week ends, and picked up the invoices and certain books, the check book, or something of that sort. He kept most of the other books at home. That was the only time he was there—on the weekends. And they were not transacting much, if any, business then. He was not there during the week. But he made out Mr. Ormont's tax returns, year by year, for 13 years—13 years.

And the Government in this case, through the goodness and kindness of my client—he did not have to now, but he did—he threw his books open to them—all of them; all of the books and records. He did not know what they wanted to see. Mr. Phoebus had told him: We are here to see if you owe any more tax, or words to that effect. So he said: There are the books and records. He had them available, whenever they wanted them. They made a thorough search of them, and made such copies as they wanted to.

You can bet that if they could have found anything with a magnifying glass, they would have had it here, because that's what they have done; that is what they have tried to do. They are here, not to call them black when they are white, or white when they are black. They have called them black when they are white, in order to arrive at a conclusion.

All they [1519] have is a theory, and that reminds me a little bit of the two women who were talking, and they were married, and one of them said to the other one: "I always hear you calling your husband, it sounds like you say 'Theory.' Is that his name?"

"No," the lady said, "that isn't his name. His name is John."

"Well, why do you call him Theory?"

"Why," she said, "because he never works."

So theory never works. It isn't a thing that ever works out. You can have a theory but that doesn't make it a fact. And so here that is what they have, just a theory.

Now I am going to confine myself from here on to the evidence pertaining to 1944. What do we have? We have the witnesses, Mr. Phoebus and Mr. Bircher. You will recall they told of a conversation here in this building on the 24th day of May, 1945. At that time there was present also another representative of the Government by the name of Schlick—I have forgotten his first name if I ever heard it—he was here, I believe, when you people were selected. He was introduced to you. He wasn't called to the witness stand.

Now the Government knew that they were going to put in that kind of evidence, the kind of evidence that the law recognizes is very, very dangerous evidence, that is to say, trusting entirely to the memory of someone. How they remembered [1520] it. All people in remembering things and repeating them repeat them in their own vocabulary and language. You don't pretend to remember just word for word, if there is a lot said.

Now those gentlemen, what did they say Mr. Ormont did and said? Well, now, Mr. Phoebus—I liked him, thought he was a nice witness, very nice witness, very fair witness—he told as best he could recall some of the things that he recalled that he said were said there. I asked him if he remembered everything. Oh, no, naturally he didn't have a photographic mind, he couldn't remember everything. Well, that is right. We all know that. I don't think the human lives that can remember a conversation that happened two or three years ago especially one that long. He may remember some of the highlights and maybe the highlights that he thinks are highlights are not highlights. They were to him and therefore he remembered them.

Now let's find out what he said. He told you that Mr. Ormont told him—understand Mr. Ormont is there, he has not representation, he didn't bring any witnesses along with him, they have two sitting there with them, that is, there is three of them all told, that is all right, Mr. Ormont didn't object to that, he didn't say, "I won't talk before the three of you"; a man who was doing wrong wouldn't want to talk before two or three witnesses, he might not want to talk before [1521] any, but not a man who has done right or at least thinks he has done right. Mr. Ormont thought he had done entirely right in this whole matter, and he said, "That is all right." The only thing that he did say right at the beginning before he talked about income or any joint venture or anything of the sort, you will remember what Mr. Bircher said he told him, he said Mr. Ormont

said, "What about this? I don't want this to go to other departments. I don't want to lose subsidies, I don't want to lose licenses and such like. I want to know if anything I tell you here is going to be kept confidential with you folks." He was assured that it would. Upon that assurance then he talked and told them what his income had been.

Now they say, both of them, I believe used the term "overcharges" in places, but it is strange to say that they used also another term and said that he used it. If I may find it in the record. I don't like to make a statement, and I know that this has been a long trial, that you couldn't follow all of it and carry it in your memory, so I would like to read it to you.

On page 965 of the transcript I asked Mr. Phoebus on cross-examination this question and he gave this answer:

"Q. Now didn't he (referring of course to Mr. Ormont) tell you—" Maybe I should go back. We are talking now of this money, this \$35,000 or [1522] \$36,000. That is what they were talking about, you will recall. All right.

"Q. Now didn't he tell you that as an entirely side issue from the Acme Meat Company that on the 1st day of May, 1944, he and Mr. Himmelfarb entered into a joint venture?

"A. Yes, sir.

"Q. And he told you that the money, the \$35,000 plus, that he had received was received through that joint venture?

"A. Yes.

“Q. And he likewise told you, did he not, that they having entered that joint venture on May 1, 1944, that they decided to and were using a fiscal year for accounting for income?

“A He told me that they had that date filed a return on that basis.

“Q. Yes. You subsequently found that they had filed such a return, didn't you?

“A. Yes, sir.”

Now that is what the witness says that Mr. Ormont told him. They entered into a separate side issue, a joint venture. That is what Mr. Ormont thought it was. That is what he told him it was.

Now let's see if that isn't corroborated by another witness. [1523] There is Mr. Bircher. On page 1103, lines 12 and 13, Mr. Bircher was answering a question, and after stating considerable he then said: “That in addition they had this side venture.” That is his testimony.

By the way, you remember he was a man with a wonderful memory. He told you he remembered everything about the whole thing. He was asked to give the conversation, I didn't object when he went to answer it, and he talked, and I think it covers three full pages in the transcript in answer to that, without stating a thing that was said by anybody but Mr. Ormont. Apparently Mr. Ormont stepped in there, the other three were perfectly mute, and he just started right out and pushed all of these things into their ears. But in any event I will show you that the man's memory isn't that good.

On page 1103 I asked him and he said:

“A. He said he didn’t differentiate between the business of the Acme Meat Company and their overcharge collection. He merely said that in the Acme Meat Company they were to share their profits equally after the \$24,000, after which the legitimate profits of the business were to go to Mr. Ormont. That in addition they had this side venture of collecting overcharges and they would share 50-50 on those.”

Now the next question:

“Q. He did say that this was a side venture, [1524] didn’t he?

“A. No.”

Can you beat that for a memory? A man that could remember something that happened two years ago and tell you here for half an hour every word that was said by the defendant in this case and yet couldn’t remember 30 seconds what he had just sworn to on this witness stand. He just said up here, and that is where I got the word, he had just told you that in addition they had this side venture, and I turn around and ask him, he did say this was a side venture, and he says, no. Can you beat that for a man with such a remarkable memory?

In any event, I am not going into the question of whether this man or that man’s evidence was exactly as it should have been or anything of the kind. I know human beings too well. I know they can’t do that. They make their errors, and maybe Mr. Ormont made some errors. Are you going to

condemned him for that? He thought this was a side venture and told them so. He told them all the time that he believed it was a side venture. The reason he believed it was a side venture was because Mr. Himelfarb was his employee, working for him on a salary basis, and this other—I don't know where it came from, I don't know whether you do beyond a reasonable doubt and to a moral certainty, but in any event we will take the prosecution's own case as they argue it, their own witnesses, and that is they say that it came from the customers [1525] of the Acme Meat Company, that the customers of the Acme Meat Company paid, as they say—and they love to say it because it listens better in this kind of a case, from their point of view—they say “overcharges.”

I don't know what overcharges are. But the record in this case is that these moneys were not regular charges at all against any customer. Mr. Phoebus told you that Mr. Ormont told him some customers paid it, some didn't. Now if you are running a business and collecting overcharges, you are going to collect them uniformly or else you are not going to have any regular business of it. They came in and paid, according to Mr. Bircher's testimony, these people didn't always pay when the invoices were paid, they bought the merchandise, they paid for that one day, then maybe they would come back in a few days and hand in some money. In fact, he said they gave checks at times. That is the evidence in this case from Mr. Bircher.

Now the strange thing is this. The Government of the United States seems to have plenty of help in this matter, have had since 1945, they are still here in the courtroom, most of them, plenty of time to be here now, they had time then, they have gone out and spent months, months, as Mr. Phoebus admitted on the witness stand they had access to the books from the very beginning, they had access to the names and addresses of every customer of the Acme Meat Company, [1526] every one of them, and those are the ones that it is claimed paid this money. Where are they? Did the prosecution bring one of them in here? Has there been one customer that has gone on that stand and said that he paid Mr. Ormont or Mr. Himmelfarb one dime more than the invoices? Isn't that peculiar to you? It is to me. It is to me, in a criminal case, when they want to convict a man of a felony and yet the burden is upon them. It is not upon the defendant to prove his innocence; it is upon the prosecution to prove his guilt. And you folks sit here with the absence of such things as that. Can you sit here and say that you have an abiding conviction in your mind, one that will stay with you today, tomorrow, abide with you, that you are right in finding the defendant Ormont guilty of the charge in this case? What a simple thing it would have been for them to have come in and said, these people, yes, that is exactly right.

Now I don't care personally whether this was a joint venture, legally or not, whether it was a partnership or not. To me that is not the point involved.

Did Mr. Ormont believe that it was? He did believe that it was. He did believe that it was not a part of the Acme Meat Business and he didn't have it put on the Acme books. They kept their accounts though of it.

The reason he wouldn't is because he and his employee were in this, as to the Acme Mr. Ormont was the Acme. That is [1527] the reason. He was the Acme Meat Company. And on this he put this as the other.

Now it is true that they didn't keep much record but you didn't have to keep much record of that. Not much record of a thing like that need be kept because there was no outgo, according to the record, it was income. He recognized it as income. He filed it on a fiscal year basis. He paid for it according to a fiscal year proposition. And the record is here and his 1946 income tax was paid and is reported right on that income report that is in evidence, and was fully paid as was stipulated to in this case, and that was the way you may do on a fiscal year basis. Lots of people do that. And I am sure his Honor will instruct you that you may do anything to avoid excess taxes, so long as it may be legitimately done. It is being done all the time. Why some concerns form two, three or four different institutions, copartnerships, corporations and the like, so as to put some here and some there and split it up and they don't have to pay so much tax. They don't get up into that big bracket where the rates go about 90 per cent to the Government and 7 or 8 or 10 per cent back to the man who earned it. That

is legitimate. You may do that. Now he thought that is what it was and that is the way he reported it.

I will show you why he thought it. The Government says, and the witnesses say, that he told them all the time. Why? [1528] One of them says, Mr. Bircher, that he told him he bought bonds with it. But he didn't buy very many bonds in 1944, only \$5000 worth. I just cite this to you as varying with Mr. Phoebus. Mr. Phoebus said that Mr. Ormont said he put most of it into the bank accounts and back into the business right where the Government could get it all. But if he bought bonds with it, can you imagine—now, wait, you are sitting here and if you find this man guilty you know what you have done, you have said, now you are a man that evaded tax and you deliberately and willfully did it, and that was your intention to do that, that is the kind of a fellow you were—and yet do you think that this defendant was doing that when he would take the very funds that they claimed were the income funds that he should have accounted for and put them into bonds of the plaintiff in this case? Bless your hearts, the United States of America is prosecuting here and those are the bonds he bought, and they had a record of it. Do you think that a man that is going to cheat someone is going to turn right around and patronize that fellow with the money he stole from him? Why it is absolutely absurd. If you people can find on that kind of evidence that Mr. Ormont was guilty of evading tax in this case, I say to you that you should by your very next breath and therefore acquit him, say that the man

was insane at the same time. He wouldn't have common sense if he did a thing like that, and you know it. [1529]

And now, we have got to be reasonable in these things; just reasonable. This man has a fine reputation among those who know him, and you know that. You never, I don't believe, in all of your experience, if you have sat on juries, or if you have had occasion to check a man's reputation in his community, where he was doing business, saw anyone have a better class of witnesses testify to his good reputation than those who came in here, and testified for Mr. Ormont in this case.

I have lived lots longer than Mr. Ormont. I have tried to live halfway, or probably a little better than that. I think some people might speak well of me, but I wouldn't know where to go to get a group of witnesses that stood as high as these witnesses here, —the big positions these people held, presidents of big companies, bankers, all kinds of fine people—I wouldn't know where to get them to come in and swear for me like that. I am proud to represent a man that stands that high in his community.

Now, the Court, I am sure, will instruct you that a man who has a fine reputation and character, that that fact alone, when he is charged with a crime like this, would be sufficient to create a reasonable doubt in any reasonable person's mind. And I am sure that that alone here would do that.

He is presumed to be innocent all through this case. They could have checked back. They say they did go back to 1931. Do you find them saying this

man was bad? That he did [1530] anything wrong? When did he turn wrong, if he did at all? Can you believe that a man who stood that way with his fellow men, and accounted for his income tax year by year, and bought bonds, like he did—do you believe that that sort of fellow, all of a sudden, is going to say: I am going to cheat the Government? No. It is absurd, ladies and gentlemen. To me it is perfectly absurd.

Let us take another situation: When he went up there, bringing these things, his chief concern was that he did not want them to take it up with the Subsidy Department, because if they did take it up, and he was making substantial overcharges, maybe that department might think they wouldn't pay his overcharges. I don't know. I don't think his overcharges were illegal. But if they thought he was doing an illegal act, by making overcharges, you can't find him guilty of that in this case. You cannot use that against him.

The Court will tell you, if you believe he is guilty of that, and you thought he was committing a crime, that is not a crime he is charged with having committed here. That is not wilfulness. Wilfulness means to commit the crime he is charged with, because of intentional evasion.

I don't know whether he had good advice or not when he went to a lawyer. That is not for me to criticize. He did go to a lawyer, the evidence shows. Mr. Strong says he only went after the investigation started. Wait a minute, ladies [1531] and gentlemen; are you going to say: We are going to

find him guilty, just because he went at that time, and did not go before or after that time?

You must remember his fiscal year began May 1st, 1944, and ended on April 30, 1945. He filed this fiscal year,—that is, his declaration for the joint venture, I believe it was, on the 24th day of May, 1945.

Now, under the law he had two and one-half months, I believe; in any event it's two months—maybe some of you know more about it than I do, but two months he had in which to file that after the termination or end of the fiscal year, which would mean that he had until some time in July to file it. He did not have to file it on a specific date. He could wait. He didn't. He filed it then, and went up and told them: I have filed a joint venture, or: I am filing it.

He went to an attorney. Evidently the attorney did not feel that he alone was good enough an expert on income taxes, and he called in an accountant. That accountant appeared before you. His name is on that. It is in evidence here. His name is on the return. And he filled it out, and Mr. Ormont signed it, and it was filed.

He did not have to pay any tax then, you understand. He did not have to pay the tax on his portion of the joint venture, because it would not be due until 1946, four months, and there is in evidence here, his return, showing for 1946 that every [1532] dollar, in good faith, was accounted for, and the tax thereon paid. That is the record in this case.

And counsel may say that was late. I don't know. Maybe it was. I have done a lot of work for clients, on income tax returns. I have worked with other attorneys, and accountants, and I have tried to study the law on it, and I just can't keep up with it and the changes. First it is this decision, and then another one comes along the other way, showing that you don't even know.

I venture to say, if I had anything like a complicated return, and on Monday I would go to Mr. Bircher, and on Tuesday to Mr. Phoebus, and on Wednesday I go to Mr. Eustice, and they figure it out—I venture no two of them will figure it the same. They all have different ideas. That is the situation we have. Then the Government comes out with a lot of more forms. Jack Benny and a lot of them have had a lot of fun about income tax returns, and they are not far from right.

I know that I have been through a lot of those things, and it is just one of those things. But in any event, let us concede for the purpose of argument that Mr. Ormont should have accounted for the portion of income he received in 1944 from the joint venture, and he should have accounted for it on his 1944 return; let us concede that just for the purpose of argument, the amount I think he actually got out of that in 1944 was \$11,000 and some odd dollars. That's a far cry [1533] from twenty-three or twenty-four thousand dollars which Mr. Strong tells you he should have accounted for in 1944—their charge in the indictment. That is their charge.

Of course, the presumption, and it is a very violent one, the presumption is that every one knows the law; and we turn right around and find that nobody knows the law. There is no such thing. And the longer I work at it, and I have been through it a long time,—the less you know, and you know others don't know the law. We keep trying to get a better concept of it, but it would be very violent to a poor layman, and maybe some of you men know a lot of law; I don't know; but I don't think you would want to be tried for a crime on the strength of your knowing the law. Maybe you would find out you were mistaken. As we often do. The Supreme Court tells us quite frequently we were wrong; and maybe the next decision of the Supreme Court will tell you differently.

This man did not know. He had no wilfulness. How are you going to find wilfulness, with a man who goes right out in the open, and puts the funds in the bank, and puts them in bonds; never hides a thing. The evidence shows that he never hid one single solitary thing in this case. How are you going to say, not beyond reasonable doubt—I don't believe you can say at all that the proof in this case stands up to showing any guilt on the part of this man. Not a bit.

Mr. Bircher said he remembered the whole conversation, [1534] and he was told at that time that the only books and records were that Mr. Ormont had a little book. He asked him to let him tear out a page, so that he could copy off figures. He did. It is here in evidence, and that was the record.

There were no other records. That was the way it was kept. Yet, there was a man with a memory. He has a wonderful memory. I wish I had it, and could remember as correctly, and yet he must have inquired within two months thereafter, or thereabouts, for these very same things.

The Government has introduced in evidence Exhibit 51-C, the letter from Sam Ormont, signed by him, addressed to Mr. Donald Bircher, Special Agent, Federal Building, Los Angeles:

“Dear Mr. Bircher:

“In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, those were added to the previous accumulated total.

“This record is accurate to the best of my knowledge and belief. No other records were kept.”

What did he need with them? Why did he inquire again, and ask for the letter, with that beautiful memory of his, when he told you of things more than two years ago, when he was on the stand, and yet he hadn't remembered it 30 days after.

So this man was perfectly willing to tell him. He told [1535] him, and he had in his own mind no intent. No matter what you have done; say you are wrong, but you do not know it was wrong, you don't hesitate on those things. That was exactly the situation here.

This man, Mr. Ormont, the defendant in this case, had nothing to hide; nothing to fear in his own heart. You can only judge him by that. I don't know of any evidence in this case that would warrant you finding beyond all reasonable doubt, or finding beyond any reasonable doubt that there was any guilt or intention on the part of Mr. Ormont in doing what was done here. He does not deny he did that. You will recall that I let everything go in. We did not hedge on this and that. The records are here. They have everything they needed from Mr. Ormont. He thought they were down there for just what Mr. Phoebus told him, to find if he owned any more tax. He said: Gentlemen, all I am interested in is not to lose my subsidy, or my license. But if you find that I am owing any tax, send me a bill, and show me wherein I owe it, and I will pay it. Can you beat that?

There is no evidence, so far as the record is concerned, that he was sent any bill for anything, excepting a bill charging him in this case, before the Grand Jury, that only hears one side of the evidence. That's the bill that was sent to this man.

All I ask on behalf of my client is fair play, just a [1536] fair trial; tried according to the way you, if you ever had to be tried, would want to be tried.

Every one of you answered the question his Honor asked you, if you were in the state of mind in this case that you would be willing to submit your case, or a case of one of your loved ones, to people in that same frame of mind, and you said yes. You would not be sitting here, if you had not. We be-

lieved you then, and believe you now. I am satisfied that you will treat this case just as you would want yours, or that of one of your loved ones treated. You would not want him convicted on guess, conjecture, on supposition, and theory. You would say: Mr. Government, if you have got a case, prove it. That's what you would want.

Mr. Ormont raised his right hand on the stand here. You saw him. There was no use putting him on about these conversations, because he had conversations. Whether those were in the exact words or not, I don't know. But I certainly was not going to ask about them. That is up to you. But the big element of the crime is: Did he not pay a tax? Or did he not report some income? That is the big element: Did you not report income that you should have reported, and did you intentionally and wilfully fail to report it? That's the thing. Not: Did you make a mistake? [1537]

People sometimes think, should I report it this year or the year before or the year after or something of that sort. If they are wrong in that you cannot condemn them for that because they had their belief in the matter and acted accordingly.

I am not going to worry you any longer because I am sure you have listened to this evidence very attentively and I am sure that you will treat this case as you want to be treated if you had to have a trial. And I do thank you, each and every one of you, for your kind attention.

The Court: Mr. Strong.

Closing Argument in Behalf of the Government

Mr. Strong: Your Honor, counsel, ladies and gentlemen of the jury: This is the last time I will speak to you about this case or in this case. When I am finished here his Honor will give you the law, the instructions, which you have to follow, as you know. Then the case is in your hands. Then my job is finished and your job begins.

Now my job is not to secure convictions, it is not to prosecute anybody to a definite result; my job is just to present the evidence. That is all I am supposed to do. It is your job to decide whether a violation has been committed, whether the indictment correctly charges that the law has been violated, and anything that I say about the evidence is just comment on my part, it is just argument. As I have told you [1538] before, if your view of the evidence disagrees with mine, you pay no attention to mine at all. I am trying to give you a summary of the evidence as I see it. But if you see it differently of course it is what you see that governs, not what I see that governs.

So I am going to take just the 30 minutes allotted to me, possibly less, to just tie up a few things that I think have been brought in as some more of those extra jigsaw pieces that I was telling you about, some more pieces that haven't got much to do with this case, that don't help you one way or another in deciding what the facts are in this case.

Of course you have to be convinced beyond a reasonable doubt, and the Government never asks you to

bring in a verdict of any kind unless you are convinced beyond a reasonable doubt. That is the law. His Honor will tell you about it. I am not asking anything different. I ask you to simply judge these facts on the basis of the law as his Honor will tell you, and then I ask you to ask yourselves whether or not you are convinced, not only beyond a reasonable doubt in this case but beyond every possibility of the slightest doubt of any kind—beyond all doubt. Is there any doubt at all as to what happened in this case?

Mr. Robnett says he likes me. I like Mr. Robnett too. Mr. Robnett has had a very difficult case here, and it isn't Mr. Robnett's fault. It has nothing to do with him at all. [1539] It is just the way the facts are. It is just the way the evidence is. There isn't anything you can do if the evidence comes in and clearly indicates something. There is nothing you can do about it except one thing, you can try to take someone's attention off of the evidence. And while listening to Mr. Robnett and also to Mr. Katz yesterday I was beginning to wonder who was being tried here anyhow. I thought that the defendants were Ormont and Himmelfarb. After a while it began to sound as though there was something that I was doing that wasn't right. Maybe I am one of the defendants. Then it is Mr. Eustice, he is not doing something wrong. And Mr. Bircher, something wrong with his memory. And even the Supreme Court, you can't even depend on them, they change their minds and you might get a different decision. And then of course the law, the law is complicated,

confusing. There are so many things to worry about, so many things to think about that have nothing to do with this case, and it is very easy to lose sight of the salient facts in this case, the facts that show beyond a reasonable doubt that the defendant Ormont unlawfully and wilfully attempted to defeat and evade the payment of a tax by filing a false return.

The facts show that the defendant Himmelfarb did exactly that as charged in Count 2. It is so easy to lose sight of those few salient facts if you start listening and paying attention to things that distract you, things like, this is not [1540] a court of justice, this is a court of Eustice, and Mr. Strong is strong but his case is weak. That is all right. It is funny. It is amusing. But this isn't a funny case. This is a very serious case. It is serious to the people of the United States and to the Government. It is a serious matter when you wilfully and unlawfully attempt to evade and defeat a tax, especially by filing a false return. That is a very serious matter. There isn't any room for levity in that.

We are not here on the basis of anything that might be funny or amusing; we are here on the basis of a very simple proposition: did these defendants do the things that we charge them in each of the counts, and if they did them, did they do them wilfully and intentionally, as we charge, or didn't they? Those are the things to be considered.

Now as I said to you at the outset, this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, and in connection with that

sale of meat they collected money which was shown on the invoices and reported on the books. You heard that testimony.

Besides that, on the other hand, they collected some more money. They like to call it gifts. They like to call it something else. But you know what it is, it is overcharges, extra money on the side. Did they collect that as a special or separate venture? Was that a separate enterprise that they had, as though you would run one factory on one side of [1541] the street under one name and another factory on the other side where you are doing something else? No, the evidence here shows that it is exactly the same transaction. You sell the same meat, you get part of the payment with the left hand and part of the payment with the right hand. So of course after they got caught by the investigators, and the investigators came in, they have to get some other reason to explain this away to get out of something that they have fallen into. So they come up with the joint venture idea. We have talked enough about that joint venture.

Now the other counts, as I have told you and as his Honor will tell you, is not in the case. I did talk with reference to the evidence to the years 1942 and 1943. As I told you when I was discussing it, I wasn't talking to you about that evidence to show you that a violation had been committed in that year, because those counts are out, but I discussed that evidence because they have a bearing on wilfulness. The way a man transacts business, the way he conceals or doesn't conceal, the way he does things

with reference to prior activities in relation to his money and his income, that all tends to indicate whether he is acting wilfully or deliberately and with a preconceived notion when he fails to report a substantial part of his income for the year 1944. That all comes into the picture. You can take those things into account. [1542]

You can take into account the fact that a man who is in partnership, one defendant in partnership with another defendant, goes around pretending that he is not in partnership, that one is the employer and the other is the employee. Then you also can take into account the explanation that they make for that. The explanation they made to Mr. Bircher, the man with the marvelous memory. He has a good memory. I think you will find he told you substantially what happened in line with what Mr. Phoebus told you.

They explained why they didn't report themselves as partners, because it might embarrass them with some other Government agencies. And they explained to you why they would rather call these separate payments gifts, because it might embarrass them with some other Government agencies. Well, you know what they are doing here. They are selling meat, getting money with the right hand and the left hand, and they are reporting the money that they get with the left hand and not reporting the money that they with the right hand. It is as simple as all that.

Now you were told by Mr. Robnett about a million dollars going through those books and about

the accounts and all that money. You remember the reason I pointed out that Mr. Ormont had a lot of money in his personal bank account was because he testified that he carried a lot of cash because he was afraid of banks. I was just showing you that a man who was [1543] afraid of banks that carries \$10,000 or \$12,000, as he says, in his pocket, why is he depositing such huge sums in his personal bank account at the same time? Is he afraid of the banks or isn't he? And if he is afraid of banks, wouldn't you think he would put the lesser amount in the bank and keep the larger amount out?

Now you look at his bank account. You will find out what sums he deposited during the years he said he was afraid of banks and that he was carrying the cash, and if you don't believe that story then do you believe the story that he had any cash, that he had any money that he accumulated from the preceding years. Of course if he had money which he earned in the preceding years, it isn't part of the income for the year 1944. Our job is to prove that this money which we claim was part of the income for 1944 was part of the income for 1944. And it is such an easy thing to come in and say, "I had a lot of cash in my pocket years back, I have been carrying \$10,000 or \$12,000. That is what was used to buy bonds." What bonds? Well, he can't identify the bonds, but it was to buy the bonds. [1544]

Do you believe that or do you believe that that money was income in 1944, not only as Mr. Eustice testified but as the defendant himself reports on

his fiscal year return? If you want to forget everything that Mr. Eustice said and if you just look at that fiscal year return, which shows \$71,000 miscellaneous income for the year beginning May 1, 1944, and ending on April 30, 1945, and just take 8/12 of that amount, and you will find out how much he earned that year in addition to what he reported. You don't have to look at the books, you don't have to listen to Mr. Eustice, you don't have to listen to anybody. They show it themselves on their returns.

And then you are told by Mr. Robnett that it is ridiculous for a man to invest his money in the plaintiff in this case, when the plaintiff is charging him with violating the law. Who is the plaintiff? The people of the United States. Where would you find a safer investment than an investment in the future of the people of the United States? I don't think you will ever find a safer investment than that. What difference does it make whether you put your money in the plaintiff's bonds or somebody else's, as a matter of fact. The question isn't, did he buy bonds that somebody could check or did he put it in an account or anything like that; the question is, did he report that money on his 1944 income tax. That is the question. And the answer obviously is no, because [1545] he himself indicates it on some other return.

Then the question is, did he willfully attempt to evade and defeat the tax for that year by filing a false return for 1944. That is the question. It has nothing to do with whether you bought bonds openly or you didn't buy bonds openly.

Mr. Eustice, as Mr. Robnett told you, did check some larger amounts and smaller amounts, but let's get a little more precise on that testimony. You will remember he told you that as to the years which are covered by this indictment, that is, the years '42, '43 and '44, that he checked every item in and out and tried to trace it, but that he also checked as far back as 1931, and on some of those older accounts he only checked the largest amounts.

Now I say to you that the mere fact that Mr. Eustice in checking to find out whether that income was earned in 1944 went all the way back to 1931 to see if there was a possibility of somebody accumulating money, that in itself indicates the completeness and thoroughness of his examination.

As to Mr. Link's testimony, did you hear any contradictory evidence from Mr. Link's testimony? If you did, then you heard something that I didn't. I don't remember a single word of contradiction as to Mr. Link's testimony. Whatever it may be, whatever weight you may give it, whatever weight you may decide not to give it, one fact is that there isn't any contradiction to it. None. [1546]

Now I am taking these up haphazardly because that is the way I have written them down, as they went in, and I simply want to cover some things that I think might tend to confuse as some of these extra pieces going in.

Mr. Robnett mentioned that the law recognizes memory testimony as dangerous. Well, that is the best kind of testimony there is. What a person saw, what he heard. How else would he tell it to you

except as he remembers it? As a matter of fact, if he writes it on a piece of paper he can only use that to refresh his recollection, and then he has to testify to what he himself remembers. And as to the contents of written documents, you can't have anybody testify as to the contents of them because those documents are the best evidence of what they say. Remember Mr. Katz arguing yesterday that there wasn't any testimony, only documents? Mr. Robnett is arguing today that memory is no good. In other words, testimony is no good. Well, if testimony is no good and the documents are no good, is there anything that is good as evidence. There isn't anything left, as a matter of fact. You can never have a case because you would have no evidence.

I will get to Mr. Katz in a few minutes.

The testimony of Mr. Phoebus, Mr. Bircher, completely uncontradicted, not a word in contradiction—and I just want to call it to your attention—isn't what Mr. Phoebus or Mr. Bircher testifies to what they saw? Both of them are testifying [1547] as to what the defendant told them, and just because the defendant said to them he only earned \$11,000, that doesn't mean that he only earned \$11,000 extra that year. All that means is that that is all he told them, but he may have earned more, and the income tax return, the fiscal year return, if you take 8/12 of that you will find that it is closer to \$22,000 and not \$11,000. [1548]

But even if it is \$11,000; let us take \$11,000, which he admitted he earned in 1944. That's enough.

We don't have to prove the precise figure. We just have to show a substantial amount.

We are charging intent to evade and defeat, by filing a false return. Is his return for 1944 any less false, because \$11,000 was left off of it than it would be if \$22,000 were left off? Does it make it any less or more false one way or another? It is false because he has not got the full amount in. Only a few pennies would not make any difference; in fact, only a few hundred dollars would not make any difference.

Through the story got through Mr. Bircher, he figures it is \$11,000. Do you think anybody who reports income, as Mr. Ormont did, for the year 1944, of \$12,000, and leaves off \$11,000, is not filing a false return? He is reporting only half, according to his story, and only one-third the amount we say was not reported.

It is true that Mr. Bircher and Mr. Phoebus testified that Mr. Ormont told them that he had a joint venture. When did he tell it to them? The afternoon of May 24th. On the morning of May 24th he filed a joint venture return. On the 21st they had gone to some accountant to prepare a return. Prior to that they had gone to see an attorney. He talked to the accountant, and then the accountant, after the attorney talked to him, went to see the defendant, at his home, or somebody's home, on the night of the 21st.

Did the preparation of a return in this case require seeing an accountant? It was not complicated; there are not enough words to cause a com-

plication to anybody. They gave: Miscellaneous income, \$71,000.00. Nothing for deductions. Then they skip a few pages. They divide it fifty-fifty. I submit to you, did they need an accountant to fill out that? Did they need one to unravel the complicated tax law?

There were no complications. It was all clear profit. There were no expenses attached to the earning of the \$71,000.00. The reason there were not any expenses was because all expenses were in connection with the amount reported. But it wasn't a separate venture. There we some sales of meat, and they only gave a part of those. It was on the amounts shown in the invoices, and the other is shown on the little piece of paper.

That is the whole point, when I say they went to a lawyer. There isn't anything wrong in going to a lawyer. Any person who has any doubts about the law, and would like to have them resolved, should go to a lawyer, and if he has anything he wants to know about income tax, he should go to an accountant. I don't say there is anything wrong in going to them. But I say it is in the circumstances surrounding the time. The investigation commenced about the 18th day of May. They wanted to examine his books, to know if there was anything due. So [1550] he starts to rush around. He rushes to an attorney; talked to him. We don't know what they talked about, because that is a privileged communication. That attorney talked to the accountant. After all this palaver, all this talk, all these conversations, what do we get in the return? It says: Miscellan-

cous enterprises; miscellaneous income \$71,000.00. It's the time that is important, the timing of these things.

That afternoon, after they filed the return, surely they came upstairs the same afternoon. They filed it in the morning, and came upstairs and told Mr. Bircher and Mr. Phoebus, and told Mr. Slick—by the way, he is on his honeymoon—and these other people: We filed a return this morning. We are going to pay the tax. The question isn't whether they paid the tax eventually. The question isn't whether they are now owing any money to the Government. But the question is, when they filed the income tax return, did they state the correct income, or pay the correct tax?

The problem is here: Did they unlawfully and wilfully attempt to evade and defeat a tax, when he filed his return, as charged in the indictment?

Mr. Robnett says: Where are the customers? You remember the testimony. Mr. Ormont was asked about the customers; he was asked by Mr. Bircher and Mr. Phoebus to give them a list of customers, so they could check. No customer list. When this case was in trial, why did he have to bring in a list of [1551] customers, when they themselves filed a return for the fiscal year, which shows how much money they made; shows at least as much as we charge. They sent a letter, through their accountant, telling almost exactly in substance what we are telling you here.

In this letter there are no other books. The book they have is a cumulative record. What cumulative

record? That piece of paper shown to Mr. Phoebus, and Mr. Bircher. That is the only record, Mr. Ormont told them. Every day he writes down this sum, and keeps the total. Listen to the instructions of the Court, and decide for yourself, whether that is the kind of a record an accountant could possibly honestly come in and base a fiscal year return on.

You know, accountants are supposed to know about the law too. They know that kind of a return can't be filed unless they have a record of the type his Honor will instruct you on. I submit this is no record. You can't check it; you can't do anything. It is a piece of paper with cumulative totals.

Mr. Robnett said Mr. Ormont was honest, and believed this was a joint venture, and was not a part of the Acme Company's business. I won't even discuss that. Mr. Robnett also said that the reason Mr. Ormont knew it was not part of the business was because he was the employer, and Mr. Himmelfarb was the employee. Is that true? Don't you remember Mr Gorgerty, when they wanted to insure their stuff, they insured it in a [1552] way that was truthful, and the way they wanted that insurance in case it was needed. Payable to whom? Sam Ormont and Phillip Himmelfarb, co-partners, doing business as the Acme Meat Company.

You remember what Mr. Ormont told Mr. Bircher and Mr. Phoebus. He said that their relationship was that of employer and employee, because it might embarrass them if it went to some agents having to do with subsidy. I won't go into that, because Mr. Robnett told you about the subsidy.

Whatever reason, that is not the fact. There was concealment right down the line.

Of course, his Honor will tell you, if you can figure out your taxes, and what you owe, on a basis that you pay less, not more, that it is right to do it. But you can't evade it. You cannot do it illegally. You cannot do it by failing to disclose to the Income Tax Collector what your income was. You have to do it by putting down your income, and deductions, and not by putting it on a fiscal year basis, after you are caught, and just in the nick of time, giving him some balance. If you have a fiscal year venture you do it as required. If you have a fiscal year venture, if it is the same business, and you are taking money with one hand, and money with the other one, you cannot do it by a fiscal year venture, or a joint venture, pertaining to overcharges on the sale of meat. [1553]

There were a lot of witnesses dealing with reputation of the defendant. They were all very nice people. I am certain that if any one of you, as members of the jury, were associated with someone, somebody you know, concerning whom you have not heard anything bad, and you were asked to come down and testify to the character of the witness: Have you heard anything bad about him? Do you know his reputation? Surely, you would go and you would testify for him. Why not? If a friend or business associate of yours was in the same line of business, selling meat, one of your associates, even if it were with reference to concealing some income received from overcharges on the sale of meat, side

money, surely, you would testify there was nothing wrong. But the thing is, in these cases the violators don't walk around with a sign on saying: My reputation is good. You don't know what they are engaged in, that they are concealing something from the Government. They are not going around telling their friends and business associates. You believe them to be perfectly honest and reputable people. You know nothing about those activities, and these witnesses come in and say they know about the man's reputation, and that it is fine, wonderful. He pays his insurance. He pays his premiums. He is a good man. Do they know anything about these other facts? No. [1554]

Do they know anything about these other matters? Two of those people testified that they knew the defendant's reputation in the community. When I asked them who they had talked to, well, they never talked to anybody. A person's reputation in the community is different from what you personally think of him. You may think he is a good man and yet the community at large may give him a different reputation. At least two of those witnesses indicated that although they testified that his reputation in the community was good, they really didn't know his reputation in the community. They never talked to anybody about him. How could they know his reputation? But those people weren't doing it deliberately, I am certain of that. They were asked the question, Do you know his general reputation in the community? Sure, I think

he is a fine fellow. You answer yes. That is the danger of those questions. That is the danger of reputation testimony.

Reputation testimony, if it creates a reasonable doubt in your mind, of course is the type of thing that should be gotten in by the defense, and if you have a reasonable doubt about the defendants' guilt, it doesn't make any difference how you got that reasonable doubt, and his Honor will tell you that you have to be convinced beyond a reasonable doubt. But are you going to take reputation testimony, general testimony, and say that that is enough to create a reasonable doubt [1555] in a case like this, a case where the evidence of the wilfull attempt to evade and defeat is as clear as you have it here? That reputation testimony should be like water off a duck's back. It doesn't mean a thing. Those people don't know anything about this man's operations with reference to his income.

Well, I have very little time left, and I think I will turn to Mr. Himmelfarb. Do I have 10 minutes at least, your Honor.

The Court: About seven minutes, because after you conclude we will take a short recess and then I will instruct the jury. That will take us until about 12:30, if you conclude in about that time.

Mr. Strong: Very well.

Now you heard the argument of Mr. Katz. Mr. Katz is laboring under precisely the same difficulty that Mr. Robnett is. He is a very fine lawyer but his client hasn't any case in defense. That is the trouble. And the government's case is pretty strong. So you talk about something else.

What did Mr. Katz talk about? He talked about this is a court of Eustice, not a court of justice; Strong is Strong but his case is weak—things like that. And then Mr. Katz goes on and tells you that there isn't any evidence in this case, no evidence he says. What about those records? Aren't they evidence? What about the letter that I read to you yesterday [1556] which was signed by Mr. Himmelfarb. Isn't that evidence? It has his signature on it. It tells about the money. They have no books and records. How did they distribute it? Oh, every now and then. How much money? Isn't that in evidence? Take 8/12 of that money that he has on his income tax return, the fiscal year return for 1944, Government's Exhibit 6, and it states on there, over Himmelfarb's signature, that he will get 50 per cent of that \$71,000. Isn't that evidence? Take 8/12 of that amount and you get about \$22,000 earned in 1944. Isn't that evidence? How about his bank account. That is in evidence. Of course nobody testified as to those books. If the books show on their face what they purport to show, if the records are clear, you can't have testimony. The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case.

Mr. Katz keeps telling you, not a word of testimony, nobody testified, not a word of testimony. I began to think that maybe he thinks the only kind of evidence that is good in any case is testimony evidence. But you know that isn't true. There are several kinds of evidence. One is testimony of wit-

nesses, that is good; the other, just as good, are the books themselves, the letters, the signed Internal Revenue statements—all these things, that is all evidence.

And there is nothing that says that you have to win a [1557] case only on testimony, nor is there anything that says you have to have testimony. You can win an entire case just on the basis of record evidence, if the record evidence proves to the jury beyond a reasonable doubt that the things that the government charged occurred did occur. That is all you need. That evidence is in the record, ladies and gentlemen of the jury. That money was earned through that so-called joint venture. Mr. Himmelfarb says so on that return, and the letters which he sent in through Mr. Malin. They are all signed by him. You can examine them.

Then Mr. Katz tells you, look at these records. One was prepared by Mr. Moody, he is an accountant; and the other is prepared by Mr. Malin. So what? Where is Mr. Moody? He is the accountant for the defendant and he has something to say in the defense of the defendant, why didn't the defendant put him on the stand to testify? Why didn't they put Mr. Malin on to testify as to what he knows about that? I had him on the stand for a limited purpose, as much as I could get. Did they call him back? Was there something with reference to the preparation of that return which corroborates the defendant Himmelfarb? Why didn't they put Mr. Malin on the stand to tell you about it then? He is just as accessible to them as he is to me. And

if it is their defense, it is their witness. They didn't put Mr. Moody on, they didn't put Mr. Malin on.

You saw this business of the partnership. I am not going [1558] to go into that again. Both of them are partners, and on his return for the year 1944 Mr. Himmelfarb says under oath that he is an employee. Was he an employee? That is not what he told Mr. Gorgerty, that is not what happened when he got his insurance changed. Then he was a partner. But if it is convenient to say he is an employee, oh, well, what difference does it make whether it is under oath or not? He says he is an employee. Does that show that the man acts wilfully when he conceals things or doesn't it? Does that show that he is engaged in a wilful attempt to evade and defeat or doesn't it?

Then Mr. Katz kept repeating to you that there isn't any evidence, there isn't any evidence. It began to sound as though this constant pounding away was going to produce a result. How can it produce that result upon you when you have seen the evidence? You have heard it analyzed, you have heard it discussed. Can anyone say that there isn't any evidence? Can anyone say that there isn't any evidence from which you can find beyond a reasonable doubt that the defendant Himmelfarb committed the acts as charged in count 2 of the indictment?

I don't think so.

Now I am not going to discuss this any longer since I think I only have a half a minute left. It is now your job. His Honor will give you the instructions and I am finished. I have put in everything that there is and I think you will agree with

me that when I say to you that I have tried to put in everything I can, have. I have tried to explain to you what it shows. I don't think I have been unfair to the witnesses. I don't think I have been unfair to the defendants. I have tried to limit the matter just as much as possible. I have told you what that evidence shows, not to me as a lawyer but to me as an ordinary human being. If you want the kind of activity that was shown to have occurred in this case, if you want that kind of activity, if you think what Mr. Ormont did was proper and lawful and was not a violation of the law, as we charge, if you are not convinced beyond a reasonable doubt that what I tell you about these is right, then bring in a verdict of not guilty. It is as simple as all that. And the same goes for Mr. Himmelfarb.

If, on the other hand, you agree with me and if you have no reasonable doubt, if you are convinced beyond a reasonable doubt that the defendant Ormont did the things charged in count 1, and that he did them wilfully, and if you are convinced that the defendant Himmelfarb did the things charged in count 2 and he did them wilfully, then you will bring in a verdict of guilty as to Mr. Ormont on count 1 and a verdict of guilty as to Mr. Himmelfarb on count 2.

I thank you.

The Court: We will have a short recess and then I will instruct the jury. I want counsel to remain a moment to discuss [1560] a proposed discussion.

(The jury retired from the court room at 11:30 o'clock a.m.)

The Court: On the additional proposed instruction, I have written out the following which will come right after the Government's proposed instructions 1 and 2, which are a description of the charges:

“In the event you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the government for the calendar year 1944, then as a matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944.”

Mr. Strong: That is satisfactory to the government.

Mr. Robnett: That is satisfactory.

The Court: Very well. We will have a short recess.

(Short recess.) [1561]

The Court: Usual stipulation?

Mr. Katz: So stipulaated.

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, it now becomes my duty as a judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow that law as I shall give it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law as I shall state them to you.

If in these instructions any direction or idea be stated in varying ways, or if a subject matter is treated first or last, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each one in the light of all the others. Nor are you to regard any repetition of an instruction as a special emphasis on that instruction. [1562]

Evidence may be either direct or indirect. Direct evidence is that which proves a fact directly in dispute, without an inference or a presumption, and which in itself, if true, conclusively establishes the fact in issue. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or a presumption of its existence. Indi-

rect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive—and there are no conclusive presumptions in this case—a presumption may be controverted by other evidence, direct or indirect, or by another presumption, but unless so controverted the jury is bound to find according to the presumption.

An inference, on the other hand, is a deduction which the reason of the jury draws from other facts which are proved. It must be founded on a fact or acts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, or by the course of business or the course of nature. The word “propensity” as I have used it means any natural or habitual inclination or tendency. [1563]

You are not bound to decide in conformity with the testimony of any number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses or as against a presumption or other evidence which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number

of witnesses who have testified. It does mean that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient proof of any fact, even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or [1564] disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor, any party. Was he, in other words, a biased or impartial witness? What degree of intelligence, what quality of memory, what grade of moral purpose, so far as concerned this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused

his testimony to appear on the surface as being less trustworthy than it really was? Was the witness without fault of his own confused or embarrassed and thus placed in a light not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the evidence admitted in the trial of this action.

Any evidence that has been received on an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party, rather than his own testimony in this trial, ought to be viewed by you with caution. [1565]

From time to time counsel for one or the other parties has interposed objections to evidence. Counsel not only have the right, but the duty to make any and all objections which are deemed advisable or appropriate, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of such objections.

At times throughout the trial the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law, and in admitting evidence to which an objection might have been made the judge does not determine what weight should be given such evidence, nor does he

pass on the credibility of any witness. As to any offer of evidence that was rejected by the judge, you of course must not consider the same, and as to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection.

The law does not require the accused to prove his innocence, which in many cases might be impossible, but on the contrary the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence his guilt, and all the elements of his guilt. If the Government fails to so [1566] prove beyond a reasonable doubt all the elements, as I shall define them to you, you must find the accused not guilty.

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of any like offenses. No such specious argument or reason can be weighty enough to justify you in laying aside that just and humane rule of law which requires you to acquit the accused unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty.

The rule concerning circumstantial evidence does not permit you as jurors to indulge in speculation, surmise, conjecture or guesswork in order to supply any element of the offense alleged by the prosecuting witnesses in this case to have taken place, where

proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guesswork can never be substituted in lieu of proof in order to justify a conviction of an accused person.

Suspicion is not evidence. Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence [1567] support the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that the accused is guilty than innocent to warrant a conviction. The accused must be proved to be guilty so clearly that there is no reasonable theory upon which he can be said to be innocent when all the evidence is considered together. Mere opportunity of the accused to commit the crime charged is insufficient to justify a verdict of guilty.

Each essential independent fact necessary to complete a chain or series of independent facts tending to establish a guilt should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant committed the crimes and must all be inconsistent with any

other rational conclusion and must exclude to a moral certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives his opinion. [1568] You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

In every criminal case the proof must substantially conform to the material allegations of the indictment.

By the arrest of the defendant and the filing of the indictment, no presumption whatsoever arises to indicate that the defendant is guilty or that he had any connection or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings, and that presumption goes to the jury room, until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. This rule as I have stated applies to every material element of the offense.

Reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall

afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture, for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. Without it being restated or repeated again, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt it is to be considered in connection with and as accompanying all of the instruction that are given to you.

In judging the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you might reach a contrary conclusion. Whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial and to the evidence which has been introduced. A witness is

presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence [1570] affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of the evidence or testimony of any witness, as may be dictated to you by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witnesses testified, as I have heretofore delineated them to you, and in addition to that relation that he might bear to the Government or to the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses, or other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jurors should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses, but you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women. [1571]

The interest of a defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime charged was committed by such defendant to entitle him to an acquittal.

You cannot base a verdict of guilt upon extra-judicial oral admission, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti and if you do not believe after a consideration of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

The mere fact that a witness is connected with the Government of the United States in any capacity whatsoever does not mean that the testimony of such a witness is entitled to any greater weight or credence by reason of that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed. [1572]

Coming now to the charges in this case. It must be kept in mind that this is not a civil suit to collect taxes in which you could decide the case by a mere preponderance of the evidence, but the charges here must be proved beyond a reasonable doubt and to a moral certainty.

As to the defendant Sam Ormont, I have entered an acquittal as to Counts 2, 3 and 4. Therefore the only count before you as to this defendant is Count 1, which is for the year 1944. As to any evidence pertaining to the years 1942 and 1943, you are not to consider the same as proof of the crime charged in Count 1, except that if you should find beyond a reasonable doubt that the acts charged against said defendant in Count 1 were done by him, then you may consider the evidence pertaining to 1942 and 1943 for the sole purpose of determining whether or not any such acts as you may find from the evidence were done in 1944, as charged in the indictment, were wilfully and intentionally done by the defendant Ormont.

The law under which these defendants were indicted in substance provides, as is applicable to this case, that any person who wilfully attempts in any manner to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:

“Any person required under this chapter to account for, and pay over any tax imposed by this [1573] chapter, who wilfully fails to truthfully account for any and pay over such tax,

and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof," shall be punished in the manner provided by law.

You are not to be concerned with such punishment, as that is a matter which lies solely within the providence and is the responsibility of the judge, in the event of a conviction. Nor are you to be concerned with whether or not any tax which might be due will or will not be affected as the tax liability, if any, exists with appropriate civil remedies regardless of your verdict in this case.

The indictment charges in Count 1 that the defendant Sam Ormont violated the Internal Revenue laws by wilfully, knowingly, unlawfully and feloniously attempting to defeat and evade the payment of Federal income taxes owed by him for the calendar year 1944, by preparing and filing, and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, a false and fraudulent income and victory tax return, in which he wilfully and deliberately understated the amount of taxable income, and the amount of income tax due for that year, and by [1574] concealing and attempting to conceal from Federal officers, and the Collector of Internal Revenue, the true and correct income received by the defendant Ormont.

Moreover, the Government charges that while the defendant Ormont reported that his income for the year 1944 was \$12,174.57, and that the amount of tax due thereon was \$3626.58, the true sum which the defendant Ormont should have declared as to his income for income tax purposes for that year was \$36,982.52, on which a tax of \$18,143.12 should have been declared and paid.

In this connection, it is not necessary for the Government to prove the precise amount which it charges was the true income of the defendant, nor is it necessary to prove the precise amount of tax which was due on that income. It is sufficient if the Government proves that in addition to the income which the defendant himself reported on his income tax return, the defendant Ormont received as income substantially the sum alleged as taxable income during that year. In other words, the Government need not establish as to Count 1 that the precise sum of \$36,982.52 was the correct net taxable income of the defendant Ormont for that year. Of course in this respect, as well as in all others, the Government's proof must convince you beyond a reasonable doubt.

Also, as to Count 1, I want to call your attention to the fact that it refers to an income and victory tax return, [1575] and that since there was no victory tax payable for the year 1944, the words "victory tax" are surplusage, and may be disregarded by you.

The indictment charges in Count 2 that the defendant Phillip Himmelfarb violated the Internal

Revenue laws by wilfully, knowingly, unlawfully and feloniously attempting to defeat and evade the payment of Federal income taxes owed by him for the calendar year 1944, by preparing and filing, and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, a false and fraudulent income tax return, in which he wilfully and deliberately understated the amount of taxable income, and the amount of income tax due for that year, and by concealing and attempting to conceal from Federal officers, and the Collector of Internal Revenue, the true and correct income received by the defendant Himmelfarb.

Moreover, the Government charges that while the defendant Himmelfarb reported that his income for the year 1944, computed on the community property basis, was the sum of \$4111.74, and that the amount of tax due and owing thereon was the sum of \$656, the true sum which the defendant Himmelfarb should have declared as his income, computed on the community property basis, was \$17,752.65, on which a tax of \$5843.91 should have been declared and paid.

Again, as to this count, it is not necessary for the [1576] Government to establish that the true net income of the defendant was the precise sum which it alleges in the indictment, and it is enough for the purposes of this case if the Government establishes that the true taxable income of the defendant Himmelfarb for the year 1944 was substantially the sum alleged in the indictment in excess of that which he reported in his return.

Thus the charge against each of the defendants in the appropriate counts consists of two elements: first, whether the defendant Ormont as to Count 1, and the defendant Himmelfarb as to Count 2, did in fact do the things charged beyond a reasonable doubt, and if you find that they did in fact do the things as charged, then you must determine beyond a reasonable doubt and to a moral certainty whether or not those things were done wilfully as that term will be defined to you.

In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944.

Wilfulness is an element, as I have indicted, in the offenses charged in each of the Counts 1 and 2, and it must be established by the same degree of proof as any other element of the offense. Under the statute involved in this proceeding, [1577] it is necessary, before you find either defendant guilty, as I have indicated, to find that he violated the law wilfully.

The word "wilfully" as used in the indictment and throughout these instructions simply means an intentional, conscious doing of the act prohibited, that is, intending the result which actually came to pass without ground for believing that it was lawful, or conduct marked by a careless disregard as to whether it is lawful or not, or deliberate unwilling-

ness to discover and obey the law. Or, to express it another way, it means an act done with a bad purpose or with an evil motive to accomplish what the statute prohibits, without regard to what the law provides. So that you must come to a conclusion with relation to the element of wilfulness beyond a reasonable doubt from all of the facts disclosed by the evidence, taking into consideration the conduct of the particular defendant with relation to the matter charged against him, and every circumstance which bears upon that issue of wilfulness, and when you have considered all of the acts of each defendant with relation to the matter charged against him, the object to be obtained, the things that were done, the circumstances under which they moved, the motives that prompted the various persons in so far as disclosed from the evidence, and whether the particular defendant acted in good faith or not—from all of these you will determine whether or not any act charged in the indictment, if you found that it was done beyond a reasonable doubt and to a moral certainty by the particular defendant, was done by that defendant wilfully.

Every person may use all lawful means to avoid the payment of income taxes, and that the avoidance of income taxes by any lawful means does not constitute a criminal offense. It is an offense, however, to wilfully evade or attempt to evade the payment of such taxes.

The defendants in this case are not charged with concealing or attempting to conceal the gross or net incomes received by them, or the sources thereof,

but with wilfully attempting to defeat and evade income tax. Therefore, if you find from the evidence that the defendants did not attempt to evade the income tax due or owing by them, you must find the defendants not guilty, irrespective of whether the defendants did or did not conceal or attempt to conceal the true and correct gross or net incomes received by them.

If you find from the evidence that the defendants, or either of them, may be guilty of any other crime or wrongdoing not connected with the offense of wilfully, knowingly, unlawfully and feloniously attempting to defeat and evade a large part of the of the income tax due and owing by said defendant, or either of them, to the United States of America for the years set forth in the indictment, then and in that event you [1579] cannot and must not take into consideration any different or other offense or offenses that the said defendant might have committed, except as to the element of wilfulness with relation to the charge in this case only. You must find the defendants not guilty unless you believe from the evidence beyond a reasonable doubt that the defendant Sam Ormont as to Count 1, and the defendant Himmelfarb as to Count 2, did wilfully, knowingly, unlawfully and feloniously attempt to defeat and a evade a large part of the income tax due and owing by the said defendants as charged for the year 1944.

A joint venture or partnership return is merely an information return, and no income tax is due or payable in connection therewith. A partnership or

joint venture return is required to be filed for the purpose of disclosing the distribution of the income from such joint venture or partnership between or among the joint venturers or partners and where such return is filed on a fiscal year basis, the net income distributable to each joint venturer or partner must be reported by him and the tax thereon paid on or before the 15th day of March of the calendar year following the calendar year in which such fiscal year ends.

Under the Internal Revenue law, a joint venture or partnership may adopt what is known as a fiscal year, consisting of any period not exceeding 12 months, other than the calendar year, for calculating, reporting and paying income tax, [1580] and in the event of the election of a fiscal year which does not coincide with the calendar year, the persons comprising such joint venture or partnership are not required to pay a tax upon the income from such joint venture or partnership until the 15th day of March of the calendar year following the calendar year in which such fiscal year ends. [1581]

There has been placed in evidence the income tax return for the fiscal year May 1944 to April 1945, which was filed by the defendants on May 24, 1945. In this connection, it is part of your functions to decide whether the defendants actually had some income-producing enterprise, or enterprises, from which they derived the sum of roughly \$71,000, which they reported on that fiscal year basis in that return. In this connection, you must determine what enterprise, if any, the defendants

engaged in besides the operation known as the Acme Meat Company, if you decide they were engaged together in the Acme Meat Company, and whether the \$71,000 reported on that return was actually received by them as part of the transactions carried on as the Acme Meat Company, or whether the money was received as income with reference to some other transaction not part of the Acme Meat Company sales and operations.

Ultimately you are to decide in this connection, among other things, whether the \$71,000 odd dollars reported on the fiscal year return was or was not part of the income derived from the sales made as part of the operations of the Acme Meat Company, and whether that money, or a substantial part of that money, was in fact received by each of the defendants as part of his income from the Acme Meat Company operations; and if not, then whether or not books and records were kept of such other enterprise as required by the statute.

The statute in that connection, Section 41 of the Internal Revenue Code, reads as follows:

“The net income shall be computed upon the basis of the taxpayer’s annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in

accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Books need not be formal.

The Internal Revenue regulations, which have the force of law, provide that the type of books and records which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books and records which contain entries which are sufficient to establish the amount of gross income and the deductions, credits and other matters required to be shown in returns, and that such books and records shall be [1583] kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums earned must be reported upon the calendar year return for the year in which they were earned.

The defendants in this case are charged with alleged violations of subparagraph (b) of Section 145 of the Internal Revenue Code; and said section does not make it a crime for the defendant taxpayer to conceal or fail to disclose the source or sources of income.

In order for you to find that sums received by the defendants during the taxable year 1944 constituted income to them, it is not necessary for the Government to prove the exact source of that income.

A taxpayer who is on a cash basis need not report any income on his return that may be due him until he actually receives the said cash income.

If you believe from the evidence in this case that any witness in the case was influenced or induced to become such a witness and to testify in this case by any hope held out that he would not be prosecuted for any reason for offenses committed, then the jury should take such facts into consideration [1584] in determining the weight and credit which should be given to the testimony of a witness thus obtained.

United States Government bonds bearing two different persons' names as co-owners are presumed by law to be equally owned by each person whose name is inscribed thereon, and that such bonds as are in the name of one individual are presumed by law to be owned by the person whose name is inscribed thereon.

Gifts do not constitute income and no income tax is due or payable on gifts. If the defendant believed that any moneys that he may have received from any sources whatsoever were gifts, such gifts, in whatever amounts they may have been, could not properly be included as taxable income in any income tax return required to have been filed by the defendant. And if you find from

the evidence that the defendant believed that such moneys were gifts rather than income, he must be found not guilty of any of the charges set forth in the indictment.

A gift is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. The term is also used to designate that which is given; anything given or bestowed; any piece of property which is voluntarily transferred by one person to another without compensation or consideration. A gift is a gratuity, an act of generosity, and not only does not require [1585] a consideration, but there can be none; if there is a consideration for the transaction it is not a gift. A gift is dependent upon no agreement, but on the voluntary act of the donor only.

There was some evidence concerning the filing of estimates. In that connection, the law relative to the declaration of an estimated tax is that a taxpayer may use as a guide the amount reported or paid by the taxpayer in the previous year to determine what his income tax should be for the following year. For example, if in the year 1943 a taxpayer has a net income of \$10,000 upon which he pays an income tax of \$1,000, the taxpayer may file a declaration of estimated tax for the year 1944 based exactly on the income tax earnings of the year 1943, irrespective of any larger or greater amount that he may actually earn in the year 1944.

If you find from the evidence that the defendant Sam Ormont did not wilfully and knowingly at-

tempt to defeat and evade a substantial part of the income tax due and owing by him for the calendar year 1944, as alleged in count 1 of the indictment, or if you are unable to determine from the evidence whether or not the defendant Sam Ormont did or did not wilfully and knowingly attempt to defeat and evade a substantial part of the income tax due and owing by him for the calendar year 1944, as alleged in count 1 of the indictment, or if there is a reasonable doubt in your mind as to whether or [1586] not the defendant Sam Ormont did or did not wilfully and knowingly attempt to defeat and evade a substantial part of the income tax due or owing by him for the calendar year 1944, as alleged in count 1 of the indictment, then in either of those events the defendant Sam Ormont is entitled to a verdict of not guilty at your hands.

If you find beyond a reasonable doubt that the defendant Ormont, as charged in count 1, did wilfully and intentionally attempt to defeat and evade the payment of taxes due to the United States of America by filing a false and fraudulent return for the year 1944, in which he failed to disclose the true and correct amount of income which he had received during that year, then the government is entitled to a verdict of guilty as to Sam Ormont as to count 1.

If you find from the evidence that the defendant Phillip Himmelfarb did not wilfully and knowingly attempt to defeat and evade any part of the income tax due and owing by him for the calendar year 1944, as alleged in count 2, or if you are un-

able to determine from the evidence whether or not the defendant Phillip Himmelfarb did or did not wilfully and knowingly attempt to defeat and evade any substantial part of the income tax due and owing by him for the calendar year 1944, as alleged in count 2, or if there is a reasonable doubt in your mind as to whether or not the defendant Philip Himmelfarb did or did not knowingly and wilfully attempt to defeat [1587] and evade any substantial part of the income tax due or owing by him for the calendar year 1944, as alleged in count 2, then the defendant Himmelfarb, in the event of either of those contingencies is entitled to a verdict of not guilty at your hands.

If you find, on the other hand, that the defendant Himmelfarb, as charged in count 2, wilfully and intentionally attempted to defeat and evade the payment of taxes due to the United States of America by filing a false and fraudulent return for the year 1944, in which he failed to disclose the true and correct amount of income which he had received during that year, then the government is entitled to a verdict of guilty as to the defendant Himmelfarb.

Evidence of a defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations and may of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist.

It is the constitutional right of a defendant in a criminal case that he may not be compelled to

testify. The failure of a defendant to testify cannot create any presumption against him or warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt and to a moral certainty. [1588]

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the government to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the government so as to support by itself a finding against him on any such essential element.

In the trial of this case there were many instances—many of them—where certain evidence was admitted as against one of the defendants but denied admission as against the other defendant. Now it is and may be difficult for you in considering the case for or against one of the defendants to disregard completely any evidence that was admitted only as to another, but that is your plain duty with respect to evidence not admitted by the Court as against a certain defendant, and you must try conscientiously to so treat the situation.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question which depends upon evidence presented to them. You are expected to use your good sense, to consider the evidence for the purpose only

for which it was admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no doubt remains the Government is entitled to the verdict, for to the jury, to you, belongs exclusively the duty of determining the facts.

If the judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either the Government or the defendant in this case, you will not suffer yourself to be influenced by that suggestion. He has not expressed or intended to express, or intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, what inferences should be drawn from the evidence adduced or not, and if any expression of the judge has seemed to indicate to you any opinion relating to any of these matters you are instructed to disregard it.

You should not consider as evidence any statement of [1590] counsel made during the trial unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered or rejected or which has been stricken. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw

therefrom and such presumptions as the law may deduce therefrom as heretofore directed in these instructions.

It is your duty as jurors to consult one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment in the case. To each of you I would say that you must decide the case for yourself, but should do so only after a consideration of the case with your fellow-jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote either way, nor be influenced in so voting, for the single reason that a majority of the jurors are in favor of such a vote. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of other jurors.

Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of [1591] your service will lie in the verdict which you return to this courtroom, not in the opinions which any of you may have when you leave this room. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the Court would remind you, in conclusion, that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

After the bailiffs have been sworn you will go

to lunch, return to the jury room, select one of your members as foreman, and when you have reached an agreement you will return to the jury box. If you desire any of the evidence and will advise the bailiffs, they will secure it and take it to the jury room with you.

The Clerk will swear the bailiffs.

(At this point the bailiffs were duly sworn by the Clerk.)

The Court: Here is a blank form of verdict. When you have arrived at a verdict you will fill it out and the person whom you have selected as your foreman will fold the verdict after signing it, return to the courtroom and hand it to the bailiff.

All of the jurors will retire except Juror No. 13.

(The jury retired from the courtroom at 12:50 o'clock p.m.) [1592]

The Court: Mrs. Tuttle, you may be excused for the remainder of the term.

Rather than to file the instructions which I have here—I take it the instructions will be written up by the reporter?

Mr. Kosdon: Yes, your Honor.

The Court: Is it agreeable that the Clerk's copy of the transcript of my instructions will be the Court's instructions as filed?

Mr. Robnett: We will so stipulate.

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

The Court: Very well. We will recess.

(Short recess.)

Los Angeles, California, June 13, 1947

3:20 o'clock p.m.

The Court: Mr. Bailiff?

The Bailiff: The jury has reached a verdict, your Honor.

The Court: Call the jury down.

(The jury returned to the courtroom at 3:20 o'clock.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have.

The Court: The foreman will hand the verdict to the bailiff, please.

The Clerk will read the verdict.

The Clerk: "In the District Court of the United States, Southern District of California, Central Division; United States of America, Plaintiff, v. Sam Ormont and Phillip Himmelfarb, Defendants; No. 19138, Criminal.

VERDICT

"We, the jury in the above-entitled cause find the defendant Sam Ormont guilty as charged in Count 1 of the indictment, and

"We, the jury in the above-entitled cause find the defendant Phillip Himmelfarb guilty as charged in Count 2 of the indictment.

"Guy F. Campbell, Foreman of the Jury.

"Dated: Los Angeles, California; June 13, 1947."

The Court: The Clerk will poll the jury. [1594]

(Whereupon the Clerk polled the jury individually, each juror answering in the affirmative that it was his or her verdict.)

The Court: Very well, ladies and gentlemen. Thank you for your time. You will be excused until you are notified.

As to the matter of sentence, are you ready for sentence at this time?

Mr. Katz: If the Court please, we would like to have the matter go over for the purpose of making a motion for a new trial.

The Court: On behalf of both defendants?

Mr. Robnett: Yes, your Honor.

The Court: You now give notice of motion for a new trial?

Mr. Katz: Yes.

The Court: And motion for judgment non obstante veredicto?

Mr. Robnett: Yes, at this time.

The Court: Very well. I will set the motions for hearing Monday morning at 10:00 o'clock, and continue the matter of sentence and all further proceedings to that time.

Are the defendants at liberty on bail?

Mr. Strong: I think so, your Honor.

Mr. Robnett: They are not in this case, your Honor, but I was going to ask, Mr. Ormont has been on his own recognizance [1595] in this case all the time.

Mr. Strong: I think the bail is in the other case.

Mr. Robnett: Yes, it is in the other case. So we ask that he be so admitted now to bail. He is a substantial citizen and, as counsel says, he is under bond in the other case anyhow.

The Court: Mr. Katz?

Mr. Katz: The same situation is true with respect to Phillip Himmelfarb.

The Court: Very well. The defendants will be released on their own recognizance and are ordered and directed to return to this courtroom at 10:00 o'clock Monday morning for sentence and all further proceedings.

The court will stand adjourned.

(Whereupon, at 3:30 o'clock p.m., the court was adjourned.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of June, A.D., 1947.

/s/ AGNAR WAHLBERG
Official Reporter.

Los Angeles, California, June 16, 1947

10:00 o'Clock a.m.

(Other court matters.)

The Court: United States v. Ormont and Himelfarb. The matter is on this morning for a motion for judgment non obstante veredicto, notice of which was given orally Friday, and a motion for a new trial.

Mr. Katz: Yes, your Honor.

The Court: Have you prepared a written motion for a new trial?

Mr. Katz: I have, your Honor. I have prepared a motion in the alternative for acquittal and new trial.

The Court: Very well. I do not wish to restrict you in your argument, but the case having concluded just last week I think that perhaps the evidence is still fresh enough in my mind.

Mr. Katz: I am going to assume that, if the Court please, in the argument and I propose and intend therefore to restrict the argument.

However, in connection with the matter of the motion for a judgment of acquittal notwithstanding the verdict of the jury, your Honor will recall that at the motion made at the conclusion of all the evidence I delineated the evidence that was before the Court as against the defendant Himelfarb because I felt at that time the Court should particularly [1599] resolve any doubt that it may have in favor of the defendant because of the fact that evidence came into this case against two differ-

ent defendants, some of which and most of which did not come in as against the defendant Himmelfarb, that I believed and felt that the jury could not and would not be able to segregate the evidence and render a judgment upon the evidence in as against each defendant.

Now, if the Court please, we since have had the argument of counsel in this case as well as the instructions, and I wish to direct your Honor's attention particularly to the argument of counsel, and looking first, if the Court please, to the argument Mr. Strong made in opening, reading from page 1453, the statement was made to the jury:

“You know what was going on with the sale of meat. You know what those payments are. I am not even going to mention them by name. It would be insulting your intelligence to mention them—these extra, unreported side payments, that he took with the left hand, the amount of money, and put it in the left pocket, and then he puts in the Acme books, and takes the extra money with the right hand, and puts it in the right-hand pocket. Simultaneously, on the same sale of meats, he has engaged in two separate enterprises, one selling at the price shown on the invoices, and the other getting this unreported [1600] additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebe told you.”

With respect to that portion of the argument which I just read to your Honor, it was based upon testimony that was not in the case as against the defendant Himmelfarb. As a matter of fact, the argument was not made as against the defendant Himmelfarb. My client, Mr. Himmelfarb, was only convicted on the basis of those statements and that evidence that was not in against him.

Proceeding further from the point just left off at page 1454 there is the additional statement. And here we have a change, if the Court please, although the argument is an argument with respect to Count 1 as against the defendant Ormont, not against the defendant Himmelfarb, and we have a change in pronouns from the "he" to the "they." It commences:

"And they take this money, and they put it away, Mr. Ormont particularly, and on the 24th day of May, 1945, when he is caught, he rushes in and files a return."

We there have the shift back again to the individual. Here again we have a reference to matters as against a defendant of testimony that is not in the record as against the defendant Himmelfarb, arguments made to a jury with respect to a [1601] particular defendant that could not have been and should not have been made as against the defendant Himmelfarb.

Proceeding further on page 1454, and getting down to the bottom of that page, we have the statement:

“I ask you, ladies and gentlemen, if that kind of testimony will tell, whether that kind of evidence will convince you that their income tax was reported properly, or if it was on a fiscal year basis? Money that comes in as extra payment, money collected, which the right hand keeps from the left hand, money, after the investigation starts in, reported as miscellaneous enterprises, miscellaneous income; no expense, \$70,000, split, in two years—do you think that is a bona fide business venture, on a fiscal year basis, when he rushed in, on May 24th?”

There again we have a reference, if the Court please, and a repetition of references to a matter of side payments, and I am satisfied, your Honor, after a consideration of the evidence that came into this case as to the defendant Himmelfarb and the argument that Mr. Strong made, both in opening and closing, that the defendant Himmelfarb was not convicted of evading income tax, he was convicted on a matter of testimony that came in, not against him at all but against a co-defendant, of side payments and not on the basis of the charge before this Court in this case. [1602]

We turn the page, if your Honor please, to page 1456, and this is all still matter of argument as to testimony that came in as against Ormont and

presumably, supposedly, an argument as against that defendant on Count 1 and not as against the defendant Himmelfarb on Count 2.

Starting at page 1456:

“You will know about how much money they earned in 1944. That money they did not report, although they knew they earned it in 1944; knew it was part of the operation of the Acme Meat Company; and knew it was side money, in connection with the sale of meat. They did not report it.”

There again, if the Court please, we have matters, references to matters, that were not before the Court and jury, no testimony with respect to the matters that I have alluded to as against the defendant Himmelfarb, yet an argument made, and the use of the “they” in the argument as to Ormont on Count 1 which could not help but prove prejudicial to the rights of the defendant Himmelfarb, and particularly when we consider the evidence that was in in the case against him.

I call these to your Honor’s attention because I believe that your Honor should take a realistic approach to the matter of this case and know just exactly what the position was of the defendant Himmelfarb before this Court and jury in so far as the evidence that was in against him, and viewed in the [1603] light of the entire case and the argument that was made.

Now on page 1457, starting with line 2—I will start with the bottom of page 1456, line 25:

“They don’t report on how or where the money came from, but that same day, after it was filed—they filed it in the morning; Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus, and had a long discussion. You remember the record. He told them where the money was from. You remember he tried to get out of saying it was extra payments; side money. He made it sound like gifts.”

There again we had a matter, in so far as the defendant Himmelfarb is concerned, which is absolutely and completely dehors the record, and it is a matter both with respect to testimony referring to the co-defendant, with respect to the argument which presumably refers to the co-defendant, but here again we have a situation where the testimony and the argument presumably is against someone else. But I don’t believe there is any question that it is on the basis of that argument and that testimony, which did not come in the record as against the defendant Himmelfarb, upon which he was convicted.

Referring again, if the Court please, to page 1459, and commencing at line 13:

“Do you think that in a business which produced an income that was reported of \$12,000 for the year [1604] 1944, do you think that the customers of that business brought in \$70,-

000 in gifts? That is a new term for those side payments, gifts, voluntary gifts. You don't have to pay it, but what do you get if you don't? You know what those payments were."

The repetition, if the Court please, is quite consistent throughout the argument in the case.

Now if I may turn to the closing argument, in Volume XIII, and especially page 1541, commencing at line 15, Mr. Strong states in closing argument:

"Now as I said to you at the outset, this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, and in connection with that sale of meat they collected money which was shown on the invoices and reported on the books. You heard that testimony.

"Besides that, on the other hand, they collected some more money. They like to call it gifts, they like to call it something else. But you know what it is, it is overcharges, extra money on the side. Did they collect that as a special or separate venture?"

And here, if the Court please, we finally get around to a situation where Mr. Strong apparently convinces himself that this is not a case of evading income tax, and he goes on to [1605] say that it is a case involving meat and the sale of meat and discusses the matter of overcharges with respect thereto. And here again it is matters where as to the defendant Himmelfarb it is a matter of

testimony that is not in the record against him, and the argument I believe was one that was intermingled so that you 'couldn't always tell whether it was Count 1 or Count 2 that was being argued. At any rate, the use of the "they" would quite obviously make it applicable to both of the defendants.

Again at page 1543:

"They explained why they didn't report themselves as partners, because it might embarrass them with some other Government agencies. And they explained to you why they would rather call these separate payments gifts, because it might embarrass them with some other Government agencies. Well, you know what they are doing here. They are selling meat, getting money with the right hand and the left hand, and they are reporting the money that they get with the right hand. It is as simple as all that."

Here again, if the Court please, we have a constant repetition of matters of a highly prejudicial nature, matters which are not in the record as against the defendant Himmelfarb, and the use of terms making it applicable to both of the defendants. [1606]

In connection with those matters, if the Court please, I do not believe that it can be said the rules of evidence or constitutional guarantees mean anything if, on the basis of the kind of record that your Honor had before you in this case with respect to

the defendant Himmelfarb, that type of argument and those types of statements can be made and used as a basis of a conviction.

In the motion for acquittal made at the close of all the testimony I tried to call that to your Honor's attention because I anticipated the prejudicial nature of the testimony against one defendant could not be segregated or departmentalized by the jurors in their mind so that it would not affect, as it should not affect, the other defendant.

Now on page 1558, if your Honor please, we get into an entirely different phase of the argument.

Starting at line 11 Mr. Strong makes the statement:

"Then Mr. Katz tells you, look at these records. One was prepared by Mr. Moody, he is an accountant; and the other is prepared by Mr. Malin. So what? Where is Mr. Moody? He is the accountant for the defendant and he has something to say in the defense of the defendant, why didn't the defendant put him on the stand to testify? Why didn't they put Mr. Malin on to testify as to what he knows about that? I had him on the stand for a limited purpose, as [1607] much as I could get. Did they call him back? Was there something with reference to the preparation of that return which corroborates the defendant Himmelfarb? Why didn't they put Mr. Malin on the stand to tell you about it then? He is just as accessible to them as he is to me. And if it is their defense, it is their witness. They didn't put Mr. Moody on, they didn't put Mr. Malin on."

Now your Honor will recall that with reference to the witness Malin he was not permitted to testify because of matters pertaining to privilege, which is a constitutional right of the defendant to avail himself of.

With reference to the matter of Mr. Moody, the only reference was that the exhibit indicated on its face that it was prepared by a Mr. Moody, and that was called to the attention of the jury. There was nothing to indicate as to whether he was more accessible to one party than he was to the other, or accessible or inaccessible, but nevertheless the fact remains with respect to both witnesses the burden is not upon the defendant to prove his innocence, the burden was upon the prosecution to prove the guilt of the defendant. Consequently it was improper and prejudicial to call the jury's attention to certain witnesses who might have been called or who weren't called or could have been called for the purpose of establishing the defense or innocence of the defendants. [1608]

Counsel knew, and well knows, that that was the burden of the prosecution, and it was highly prejudicial to make an argument to them on the basis that it was the burden or the duty of the defendant to establish his innocence rather than the burden of the prosecution to establish his guilt.

If the Court please, I believe that these matters that I have called your attention to are serious matters.

The Court: I think your objection should have been made at the time of the argument on the first segment of facts that you are talking about when

he used "they" instead of "he." I do not believe that there could be said to be any prejudicial error there in any event because it was the contention of the Government that all of the money was earned by them as partners in the Acme Meat Company. It was suggested in cross-examination, it was suggested not only by the Exhibit 6 which was filed, the joint venture return, but repeatedly throughout the trial that it was a joint venture, something separate and apart from the Acme Meat Company. So I think that his use of the word "they" for "he" was not prejudicial.

On this latter point that you called my attention to, I think that one who is harmed by an argument cannot sit by and take his chances of acquittal and then raise it as an objection. He cannot sit silently by. I think you should have raised that point during the course of the argument. I am not sure that it is error anyhow, but had you raised it I [1609] would have instructed the jury again, as I did with regard to Mr. Malin, that he could not be compelled to testify except on matters which I permitted him to, and that was made very clear I think to the jury in the course of the testimony.

Mr. Katz: If the Court please, with reference to the matter of the statements respecting the joint venture, there again, if the Court please, the matter of Exhibit 6 was before the Court and jury with respect to the defendant Himmelfarb but the matter of the source of that income or the type and kind of income that it represented was not before either the Court or jury as against the defendant Himmelfarb.

The Court: Yes, it was. Exclusive of the testimony relating to statements by the defendant Ormont. In the first place, it was before the jury in the statement which was made by the defendant Phillip Himmelfarb in his affidavit and his letter, and in the second place it was before the jury by the testimony of at least one witness, if not more, that Phillip Himmelfarb was working at the Acme Meat Company plant during this period of time, selling customers, fixing up meat, and so forth, from which they could infer that the income derived was in that manner.

And also the witness Gorgerty, the testimony of their admission, Mr. Himmelfarb's statement to him that it was a partnership, that was also in.

Mr. Katz: At some point in that chain of reasoning it [1610] is, however, necessary to reach over into and over on the side of the testimony that came in as against the other defendant only in order to complete it, and without that it wouldn't be there. While it is true that the affidavit sets forth the income and over what period, there is nothing to indicate from what source that income was. Mr. Gorgerty's testimony did not indicate that.

The Court: That is on the return, miscellaneous enterprise. If nothing else, from the street address given on the return, which was the address of the Acme Meat Company.

Mr. Katz: It may be that some inference could have been drawn there, but there might have been any number of operations from the same place.

The Court: Well, it wouldn't be likely. I think it is a fair inference, if one testifies that he sees a person working down at the Acme Meat Company, and another thing too, the testimony of the witness Bircher and the testimony of the witness Phoebus, that Himmelfarb was there. Now I did not permit any testimony to go in as to what Himmelfarb said on the occasion of May 23rd, or whatever date it was, that they were down there, but that was permitted to remain in the record, that the witness Bircher and the witness Phoebus saw Himmelfarb at the plant, that he was in the office, that he did write something on some affidavit and that the ensuing incident occurred. He was present. [1611]

So I think that there is sufficient evidence in the record, counsel, that a jury of reasonable men and women would be justified in drawing that conclusion, and I think it is sufficient that I would not be justified in substituting my judgment for their judgment.

Mr. Katz: With respect to the latter statement, in the matter of argument that your Honor said that should have been the subject of objection, there again it is my thought that the realistic approach requires that we view the situation as it then exists. Here we have highly prejudicial statements that are made during the course of an argument, and if an objection had been made to those undoubtedly any ruling that would have followed would have been an instruction to to the jury, following repeated instructions, not to consider that except as against the one defendant, and to have made an ob-

jection at that point would have merely increased the extent of the prejudice. I mean, those things tend to prejudice juries rather than to result in effectuating or saving the record.

The Court: I don't know, counsel. I used to be firmly of that conviction when I was practicing law, but sitting on the bench and watching jurors from this side of the bench I think sometimes they are pretty careful and usually are in disregarding things that should be given no weight in their testimony. Then of course there is the other school of thought that it prejudices the prosecutor when he makes statements [1612] that he shouldn't, prejudices of the prosecution of the case and operates to the advantage of the defendant.

I think that so far as your first category of facts, the use of the word "they," that no prejudice could have resulted; and as to the other one—and I am not deciding that it was prejudicial but that if it was prejudicial I think you should have made an objection at the time and an appropriate instruction given to the jury concerning the testimony of the witness Malin, and the same situation as to the witness Moody.

For that reason the motion for a judgment non obstante veredicto is denied, as is also the motion for a new trial for the defendant Himmelfarb.

Mr. Robnett?

Mr. Robnett: Yes, your Honor.

The Court: By the way, while I think of it I want to take this occasion to compliment the lawyers on both sides in this case.

Mr. Robnett: Thank you very much.

The Court: This has been one of the most pleasant cases to try from the judge's point of view, due to the lack of bickering, that I have had the pleasure, and especially having just finished 13 weeks of the most difficult case upon my patience, so this one came as a sort of calm.

Mr. Robnett: I was just going to preface my remarks by saying that I believe in the history of my experience I have [1613] never had a more pleasant judge to try a case before than your Honor, and a more fair one. I do want to thank you very much.

I have not filed a written motion for acquittal notwithstanding the verdict, your Honor, because it would take so much time and would try your patience. I wanted to make it orally if I might and embrace in that motion all the grounds I embraced in my motion to dismiss the indictment in the first instance, the grounds I embraced in my motion for a bill of particulars, and the grounds that I embraced in my motion for an acquittal on this count at the end of the plaintiff's case, and again at the end of all the evidence and before the matter was submitted to the jury.

The Court: Your motion for judgment non obstante veredicto and motion for new trial will be deemed to have been made as if in writing on all of those grounds.

Mr. Robnett: Thank you.

The Court: And if there is anything else I can say to protect the record here so that when you get to the Circuit Court they will not say you did not, tell me what to do and I will say it.

Mr. Robnett: Thank you, your Honor. That is broad enough.

I wanted to add to that—perhaps it isn't exactly an addition; I think it was in my last motion, but if not I would [1614] add it at this time—what I deem to be an error in not striking the evidence of Mr. Eustice as to the years 1942 and 1943. That was very voluminous evidence, most all of his testimony, in other words, was addressed to those years. There was some of course addressed to 1944 but the cross-examination was particularly gone into on those years for a long period of time, as you will recall, and I believe it was really prejudicial that that evidence should be left in even with the instruction that your Honor gave to the jury that it was in there only for the limited purpose of considering the wilfulness or lack of wilfulness.

The Court: May I interrupt you?

Mr. Robnett: Yes, your Honor.

The Court: I thought that it benefitted the defendants, leaving it in, as much as it did the Government, by virtue of your cross-examination of the defendant Eustice.

Mr. Robnett: Apparently it doesn't, though, your Honor. At least we haven't yet realized the benefit.

The Court: As long as it went solely to the question of wilfulness of the defendants, it seemed to me that his testimony was pretty evenly balanced.

Mr. Robnett: Well, I am fearful that the jury were of this impression, that they were considering all of that testimony and all of the time it took

here and figured that there must be a verdict of guilty in the case based upon such a long [1615] trial and so much evidence, and that they could not have disabused their minds of that particular evidence even under an instruction that your Honor gave them that they could only use it for the purpose of wilfulness. I don't think it showed any wilfulness at all. I think, if your Honor please, that it should have shown lack of wilfulness instead of wilfulness, having acquitted the defendant Ormont on those counts.

I make that further motion at this time, or ground, and in addition thereto I wish again to call your Honor's attention to the Treasury Department's rule or policy that I cited at one time or mentioned, that where a defendant in a case of this character comes forward and gives up all the facts and evidence, makes a clean breast, as it were, out of that criminal prosecution will not follow. It is not their policy.

In the case of Lustig, in 72 F. Supp.—I believe at page 306—there a motion was made before the Court to enforce that rule. The Court didn't do it, but went into the rule very thoroughly and held that there wasn't sufficient groundwork for that.

The Court: I think that might be a basis for excluding the statement. I do not think it can be a basis for suppressing the prosecution or for granting a motion for a new trial, because under the statute the Treasury Department have the power to compromise a criminal case. It is the only de-

partment of the Government having that power not to prosecute, except [1616] the Department of Justice.

But that is not done until it is compromised, until the compromise is effectuated. Other than that, there is no person, none, from the President on down, who has the power to decide under the statutes and laws—and this is still, I hope, a government of law—whether a person shall or shall not be prosecuted except the appropriate officials in the Department of Justice. Neither has the Secretary of the Treasury any power to make such a statement, and having no power to make such a statement and making it, and somebody is induced to give a statement on that basis, it might be ground for excluding the statement.

Mr. Robnett: Might it not also be a ground for consideration of your Honor in passing judgment where, as in this case, the defendant Ormont, as you remember the evidence as well or better than I do, from the very beginning gave every fact that they asked him for, supplied everything that they finally put in, and without which, without his books and without those statements and without the affidavit that he made here and the letter he wrote them at their behest, without those things I do not believe the Government could have even established a *prima facie* case here.

You will recall that most everything was given and given freely. Now he gave them because we must assume that rule or policy had been so well publicized that a man would say to [1617] himself,

“Well, I will give them everything here,” and he did do it. He didn’t act like a man that was trying to evade anything as to income tax.

I wish to call your Honor’s attention to that situation in any event because I think your Honor will take into consideration in whatever ruling you make here all of the matters, but there were so many matters you might overlook something, and that particular thing I think is of very great importance to Mr. Ormont. They couldn’t have gotten his books without his consent on a criminal investigation, they couldn’t have had any record from him at all without his consent, they could not have had any statement from him without he voluntarily gave it to them, and they couldn’t have had the affidavit.

The Court: Have you read the Harris case?

Mr. Robnett: No, I haven’t, your Honor, but I believe that statement I have made, that he could have protected himself on a criminal investigation on his constitutional rights, that they could not have forced him to give evidence against himself. That is the reason I cite those matters to your Honor.

But in any event they are matters that I thought really showed that the man had no wilfulness to evade income tax. He had a wilfulness not to let some other department know something about what he was doing, but that I don’t think is [1618] the wilfulness that is intended in the evasion of an income tax. I don’t believe the fact that you are willing to do something over here can be used as a wilfulness to do this act. And that was what I had in mind, and I hope your Honor will give those matters consideration on my motions.

That is about the only grounds I have.

The Court: Very well. Do you wish to be heard, Mr. Strong?

Mr. Strong: No, your Honor.

The Court: Do you consent to the granting of the motion?

Mr. Strong: No, your Honor. I assume that your Honor thinks the motions should be denied.

The Court: Yes, I think so. They cover matters that I have given consideration to heretofore.

Are you ready for sentence?

Mr. Robnett: Yes.

The Court: This is a conviction under Section 145(b) of Title 26, is that not right?

Mr. Strong: Yes, your Honor.

The Court: Which provides that in addition to the other penalties provided by law the defendant shall be guilty of a felony and upon conviction thereof shall be fined not more than \$10,000 or imprisonment of not more than five years, or both, together with the costs of prosecution.

Well, I have no idea what the costs of prosecution are [1619] here.

Mr. Strong: We can figure those out, if your Honor deems that a part of the sentence.

Mr. Robnett: Couldn't you give us an estimate?

Mr. Strong: Not at this moment.

The Court: Do you wish to say something in connection with the sentence, Mr. Katz?

Mr. Katz: Yes, if the Court please. I do not believe it is necessary to call your Honor's attention to the fact that the taxes have been paid—that

was all gone into in the record of this case—that the amount of tax claimed to be due prior to the filing of the indictment was paid.

The Court: With penalties?

Mr. Katz: No, your Honor, it was not paid with penalties. Any penalties that may be due by reason of the filing for the subsequent year rather than the previous year, I presume that the Internal Revenue Department will take the proper steps to recover such penalties as may be due them.

With reference to the situation of this defendant now, he is convicted of a felony, he has that, if the Court please, to carry with him for the rest of his days. To what extent the Court believes that to be punishment, I don't know. I believe it could be punishment in and of itself of the severest type and kind.

Your Honor has before you in the way of an exhibit the [1620] net worth statement of this defendant. Your Honor can, based upon the case——

The Court: I think that this case indicates a prison sentence, counsel. I think there are many things to be said in condemnation of the practice of the Internal Revenue Agents in securing information and then building a case on it, and I tried to exclude, and I think I did exclude, all of the testimony upon which there was any basis for finding that they had not been properly warned. But I am familiar with the general warnings that are given by agents, investigating crimes. They do not emphasize, I might say, the fact that they are going to prosecute a fellow. But even so I think these two

defendants here wilfully intended to evade their income tax for the year 1944, so I do not think I am going to impose any fine. I think I will have to give these defendants a prison sentence.

Mr. Katz: That is all that I can say, if the Court please, in light of the entire case, the facts and circumstances as I see them. It is my humble opinion, if the Court please, that the fact that they stand convicted of a felony, together with a fine should more than be enough in the way of punishment.

The Court: That is a punishment. That is a very severe punishment to people who are not professional criminals, but I think what happened here is that maybe Ormont was getting [1621] along all right in his business until the defendant Himmelfarb came along with this idea of extra charges, and the temptation was a little too great for him to resist, with the scarcity of meat at that time, to make some extra money.

Mr. Katz: Your Honor is now assuming something that isn't before your Honor by way of record, which is speculation, surmise and conjecture.

The Court: No, it was side money, it was some kind of a business, according to their contentions, that didn't have anything to do with the price of meat.

Mr. Katz: No, I am referring, if the Court please, to your Honor's statement that one was getting along all right until the other came along. I think your Honor is assuming that the one party, Himmelfarb, has a greater degree or taint of guilt.

The Court: No, I do not say so. That may be, but according to all of the evidence in this case this additional charge, this additional sum of money, whether it be termed gifts or what it might be termed, didn't start until Himmelfarb and Ormont started to work together. I cannot believe that people went down in the course of a year and made voluntary payments.

Mr. Katz: I made no such contention in this case, your Honor, at no time, and I do not make it now. That has never been my position in this case.

The Court: That they were gifts?

Mr. Katz: No, your Honor. I have never been in that position.

The Court: No, your position was that it was a joint venture as to the overcharges.

Mr. Katz: My position was that this was a joint venture, yes, but in so far as this case is concerned I have taken the position that as against the defendant Himmelfarb there hasn't been any testimony in the record that came into the record against the defendant Ormont as to what they were, and that we weren't called upon and didn't undertake in the case to make any explanation. I want this Court to know that I haven't taken that position.

The Court: I am mentioning only the matter of the overcharges because it seems to me that phase of it to be conclusive as to their wilfulness on the income tax. They were getting this money from some place. It didn't go through the Acme Meat Company books.

Mr. Katz: The fact that it didn't, if the Court please, is not an indication, in my opinion, that it was for the purpose of evading income or concealing it. There may have been a purpose in concealing it from some agency or department, yes, and it was wilful on that aspect, but as to whether it was for the purpose of evading income tax, it is my opinion that that had nothing to do with it, and wilfulness in one direction [1623] cannot carry over into the other. I don't think that the actual facts would establish any such proposition.

It may be, if the Court please, that I might be engaged in gambling activities that I wouldn't want my books or records to reflect, and consequently would wilfully keep those records from disclosing that fact. On the other hand, assuming that I am an honest and upright citizen I would pay my tax upon such funds—I took a bad example when I took gambling, as your Honor will agree—speaking from the average experience of the average citizen I presume. But any funds from a source that may not reflect credit upon the individual receiving them, or which may result in difficulties with a particular department or agency, whether it be federal, state or local, if the Court please, might well not be reflected upon books and records and yet the tax due thereon be paid.

The Court: Yes, but it was not done here. It was not returned in that year. As I say, that is the indication to me, and to me that is the only phase in which I am taking that into consideration in this case, because these two defendants here are

charged in another case with violations in connection with the OPA. They are entitled to be acquitted or convicted on that charge and stand alone upon it. But in this case that is indicative of the fact that they wanted to conceal maybe ultimately whatever they were doing in so far as subsidies are concerned, but in doing that they were willing [1624] to take a chance in not disclosing it to the Internal Revenue Bureau.

In other words, the definition of wilfulness, as you will recall, includes a reckless disregard. So if they did not consciously intend the crime, the evidence shows they certainly had a reckless disregard as to whether or not it was returnable in the year 1944.

Mr. Katz: Now, if the Court please, with reference to the matter of the penalty to be imposed, I believe that the matter of rehabilitation is a primary matter that should be considered by this Court. It is my honest and sincere conviction and opinion that after the experience of these defendants, with the conviction of a felony and the penalty that would be imposed other than the matter of imprisonment, that there isn't even the remotest possibility that the defendant for whom I speak will ever engage in any type and kind of criminal activity at all. And I think that that is the purpose that should be sought to be accomplished by your Honor in this and every case, and not a mere matter of punishment for punishment's sake.

The Court: Certainly not punishment for punishment's sake.

Mr. Katz: Punishment hasn't been and isn't, in my humble opinion, a matter of deterrent to crime. I think we have had the classic example in this case of where just a little while [1625] ago this local woman, who having been punished and convicted and sentenced and served 18 years, if punishment had been a detriment under no circumstances would a person have committed the same crime, and yet she comes out and proceeds to do it over again. So if punishment were the answer, if the Court please, then our system of penology would have eliminated most of the crime we have today, but it hasn't.

The Court: Certainly, counsel, I agree with you that some other method better than that should be found, but society has found no better method to deter the commission of crime, and I have nothing that I can do except to follow the law in my sincere judgment.

Mr. Katz: I believe that your Honor can impose a punishment here which can still be consistent with rehabilitation. It is my belief that if your Honor imposed a fine that in your Honor's opinion is in accordance with what would be paid by this defendant, together with the fact that he stands convicted and will continue to be so branded for the rest of his days, is more than ample punishment.

Mr. Robnett: Your Honor, in behalf of Mr. Ormont may I say also that in his instance you

know that there will be following matters of payment far in excess of what he may have dreamed; secondly, he is conducting a business with a lot of employees and the business would have to be closed up and all those employees thrown out. He has also I think as fine [1626] a reputation as any man that ever stepped into your courtroom, and I believe you believe that.

This indictment here, if your Honor should see fit to impose the penalty you suggested rather than a fine, would practically be ruinous to his life. He is a young man. I do believe that justice will be absolutely served by imposing such fine as your Honor may see fit, including the costs which will follow, of course, and without any serving of any time. I do ask your Honor to take into consideration the fact that Mr. Ormont cooperated very fully with the officers in all respects, gave them everything they asked for, and that that should, whether under the rule of the department or not, at least be worthy of some consideration. If he had tried to hide everything it would have been a different thing, but I think your Honor should take that into consideration in this case and impose a fine as ample punishment in addition to the punishment that he will suffer naturally from having been found guilty.

Thank you.

The Court: Mr. Strong?

Mr. Strong: Your Honor, this is an extremely serious offense. It occurred during the year 1944, when there was a lot of money being made, and

I think that it is very important in this case, not only in so far as these defendants are concerned but, as your Honor has pointed out, one of the ways of [1627] deterring crime is that sufficient punishment be given here, not merely a cutting in of the Government by a percentage of the fine, but a prison sentence of sufficient time so that not only these defendants will have time within which to become rehabilitated, but all other persons who are so minded as these defendants are to disregard the Internal Revenue laws of the United States will change their minds. This is not the place for them to do it. I suggest a substantial sentence should be given.

The Court: Mr. Himmelfarb or Mr. Ormont, do either of you want to make a statement?

The Defendant Himmelfarb: Your Honor, as far as myself is concerned, I had no intentions of evading any tax. I paid it. When people came in for any information they wanted, it was right there for them. There was no intention at any time to evade any tax.

The Court: Mr. Ormont, do you wish to say something?

The Defendant Ormont: I have tried to cooperate entirely all the way through this case with the Internal Revenue Department by divulging everything I had. I was a wide-open book for them. I certainly tried to give them every bit of cooperation, and if there was any tax due I wanted to pay it, and I admitted so. I don't know, I just tried to do the best I could under the circumstances.

The Court: As I said a while ago, it is a very difficult [1628] thing to deprive people of their liberty and send them to jail, but it is one of the things that must be done under the law if a judge follows the law and his judgment.

In giving this sentence I am taking into consideration the fact that each of the defendants have been convicted of a felony.

As to the defendant Sam Ormont, it is the judgment and sentence of the Court that he be committed to an institution to be selected by the Attorney General for the period of one year and one day.

As to the defendant Himmelfarb, it is the judgment and sentence of the Court that he be committed to an institution for a period of one year and one day.

There will be no fines.

Mr. Katz: If the ourt please, may we ask for a stay of execution for 60 days to permit these defendants to arrange for their affairs and put their business in order? They haven't had any time. This matter was just concluded.

The Court: Are they on bond now?

Mr. Strong: No, your Honor.

Mr. Robnett: They are not on bond in this case. They are on bond in the other case.

Mr. Strong: I hesitate to say that perhaps your Honor should give them some time because, as counsel says, they haven't had much of a chance.

The Court: I do not think they need 60 days. I think that a period of two weeks ought to be sufficient time for them to get their affairs in order.

Mr. Strong: I think they should be placed on bond.

The Court: And they should be placed on bond.

Mr. Strong: \$10,000 each.

The Court: Yes, \$10,000 bond.

There will be a stay of execution for a period of 30 days. The stay of execution will expire on July 16 at 12:00 o'clock noon.

Mr. Strong: Your Honor said there would be no fine. How about costs of prosecution?

The Court: No fine, no costs.

The stay of execution will expire on July 16 at 12:00 o'clock noon. The defendants will stand committed thereon but be released from now until July 16 at 12:00 o'clock noon on condition that each of them file a bond in the sum of \$10,000.

Mr. Robnett: Could we have 24 hours to file that, or 12 hours even, without them being committed? It would just be a matter of as quickly as we can getting the bonds. They have been out before on their O. R.

Mr. Strong: They can stay here and get a bond, your Honor.

Mr. Katz: These defendants came in this morning, if the Court please, to subject themselves to the sentence imposed. [1630] I think that they will return here within 24 hours, or at least the additional time of 24 hours, to permit them to procure

a \$10,000 bond, which is a substantial bond. It is not going to result in defeating the ends of justice.

The Court: I will stay the execution until 5:00 o'clock this afternoon and give them time to post bond.

Mr. Robnett: Thank you, your Honor.

Mr. Katz: It will not be necessary for them to appear if the bond is posted within that time?

The Court: That is right. Otherwise they will appear on July 16 at 12:00 o'clock noon. The stay of execution will expire at that date and hour.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court, for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of June, A. D., 1947.

-----,
Official Reporter.

[Endorsed]: No. 11662, No. 11666. United States Circuit Court of Appeal for the Ninth Circuit. Phillip Himmelfarb, Appellant, vs. United States of America, Appellee. Sam Ormont, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 11, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Judicial Circuit

No. 11666

SAM ORMONT and PHILLIP HIMMELFARB,
Appellants,

vs.

UNITED STATES OF AMERICA,
Respondent.

STATEMENT OF POINTS TO BE RAISED
BY APPELLANT ORMONT

To the Honorable Above-Entitled Court, to the
Judges Thereof:

The Appellant, Sam Ormont, through the undersigned, his attorneys, hereby submits the following statement of points which he proposes to raise and urge on this appeal:

(1) Said appellant hereby adopts, without the restatement thereof, each and all of the points specified and set forth in the "Designation of Record on Appeal and Statement of Points on Appeal" by defendant Sam Ormont filed in the District Court of the United States in and for the Southern District of California, Central Division, in this case, on or about the 21st day of June, 1947.

(2) In addition to the said points so adopted, said appellant also states the following points which he intends to raise and urge on said appeal:

(a) That the court erred in overruling the various objections made by and on behalf of this appellant to various questions propounded by the plaintiff's attorney to the various witnesses, which objections and rulings will be specifically designated and set forth in this appellant's brief;

(b) That the court erred in overruling this appellant's objections to various and sundry questions propounded by the plaintiff's attorney;

(c) That the court erred in admitting any evidence over the objections of this appellant;

(d) That the court erred in each particular wherein it admitted any testimony of any witness or permitted any question to be answered over the objection of this appellant;

(e) That the court erred in denying the various and sundry motions of this appellant to strike evidence from the record.

All the above specifications will be more particularly set forth in this appellant's brief, but this

appellant intends to urge error in each and every instance wherein the court overruled his objection and in each and every instance wherein the court denied this appellant's motion to strike evidence, and in each and every instance in which the court's ruling was adverse to this appellant.

(3) That the court erred in not instructing the jury, on the Court's own motion, that the jury might find this appellant guilty of a lesser offense than a felony charged in the indictment, which lesser offense was necessarily embraced within the charge in the indictment, to-wit, violating of Section 145(a).

(4) That the court erred in not instructing the jury, on the Court's own motion, that they might find this appellant guilty of a misdemeanor as defined in Section 145(a), to-wit, willful failure to keep any records, a misdemeanor embraced within but constituting a lesser offense than the felony charged in Count I of the indictment.

(5) That the court erred in not instructing the jury, on the Court's own motion, that they might find this appellant guilty of a misdemeanor as defined in Section 145(a), to-wit, willful failure to supply any information, a misdemeanor embraced within but constituting a lesser offense than the felony charged in Count I of the indictment.

(6) That the court erred in not instructing the jury, on the Court's own motion, that they might find this appellant guilty of a misdemeanor as defined in Section 145(a), to-wit, willful failure to

pay tax, a misdemeanor embraced within but constituting a lesser offense than the felony charged in Count I of the indictment.

(7) That the court erred in submitting the case to the jury, for the reason that there was a total failure of proof of the charge in Count 1 of the indictment, in that there was no proof of an evasion or attempted evasion by this appellant of the alleged income tax charged in said count of said indictment as the tax claimed to have been due, nor was there any proof of the evasion or attempted evasion by this appellant of substantially the amount so charged in said indictment.

(8) That the court erred in submitting the case to the jury, for the reason that there was no proof that the net income of this appellant, as charged in Count 1 of said indictment for the calendar year of 1944, was substantially the amount charged in said count of said indictment.

Dated this 10th day of September, 1947.

BENJAMIN F. KOSDON and

DALY B. ROBNETT,

By /s/ BENJAMIN F. KOSDON,

Attorneys for Appellant

Sam Ormont.

[Endorsed]: Filed Sept. 12, 1947.

Received This 11th day of September, 1947, a copy of the within Statement of Points To Be Raised by Appellant, in the Matter of Sam Ormont and Phillip Himmelfarb, Appellants, vs. United States of America, Respondent, Circuit Court No. 11666.

/s/ WILLIAM STRONG,
Assistant United States
Attorney.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF POINTS UPON WHICH
DEFENDANT PHILLIP HIMMELFARB
INTENDS TO RELY UPON APPEAL

To the Honorable Above-Entitled Court, and to the
Judges Thereof:

The Appellant, Phillip Himmelfarb, hereby submits, by and through his undersigned counsel, the following statement of points upon which said appellant intends to rely and urge on this appeal:

1. That the evidence admitted against defendant Phillip Himmelfarb in this case did not establish beyond a reasonable doubt the guilt of said defendant;
2. That the evidence established and disclosed that the verdict and judgment made and entered against defendant Phillip Himmelfarb are contrary to law;

3. That the verdict and judgment made and entered against defendant Phillip Himmelfarb are contrary to the evidence;

4. That the evidence against defendant Phillip Himmelfarb is manifestly insufficient to support the verdict of the jury;

5. That the evidence against the defendant Phillip Himmelfarb is wholly insufficient to show the guilt of said defendant beyond a reasonable doubt;

6. That the Court erred in denying the motion of defendant Phillip Himmelfarb for an acquittal, made at the close of the evidence of the prosecution;

7. That the Court erred in denying the motion for acquittal made by defendant Phillip Himmelfarb at the close of all of the evidence;

8. That the Court erred in denying the motion of defendant Phillip Himmelfarb for judgment of acquittal notwithstanding the verdict of the jury, and in denying the motion of defendant Phillip Himmelfarb made in the alternative, for a new trial;

9. That the Court erred in denying the motion of defendant Phillip Himmelfarb made at the close of evidence to strike evidence and exhibits theretofore received in evidence, from the record;

10. That the Court erred in admitting in evidence over objection of defendant Phillip Himmelfarb, Government's Exhibits No. 4, No. 5, No. 6, No. 34, No. 35, No. 36A, No. 44, No. 45, No. 50A, No. 50B, No. 50C, No. 50D, No. 52 and No. 54;

11. That the Assistant United States Attorney was guilty of misconduct in making repeated references in his opening and closing argument to the jury of other alleged crimes and offenses purportedly committed by defendant Phillip Himmelfarb, of which there was no evidence against said defendant, and by repeatedly stating to the jury that the source of the income upon which defendant Phillip Himmelfarb allegedly attempted to evade income taxes was over-charges, side payments and extra payments unlawfully collected and received in connection with the sale of meat, notwithstanding the fact that there was no evidence as against defendant Phillip Himmelfarb showing that such income or any income received by him was received from over-charges, side payments or extra payments received in connection with the sale of meat, or in any other unlawful transactions; all of which said statements were highly prejudicial to defendant Phillip Himmelfarb, and deprived him of a fair trial;

12. That the Assistant United States Attorney was guilty of misconduct in stating to the jury that a witness not called was accessible and available to defendant Phillip Himmelfarb, and that said defendant did not call such witness, and in stating or inferring that if the defendant Phillip Himmelfarb was innocent, why wasn't such witness called by defendant Phillip Himmelfarb to establish such innocence, and in rhetorically demanding, with respect to another witness called by the prosecution, why such witness was not called by said defendant

and put on the stand to testify respecting matters within the knowledge of such witness and to corroborate defendant Phillip Himmelfarb, if corroboration existed; all of which said statements were highly prejudicial to defendant Phillip Himmelfarb, and deprived him of a fair trial;

13. That the Court erred in instructing the jury as to the law of this case;

14. That the Court erred in the giving of instructions requested by the prosecution and excepted to by the defendant, and in refusing instructions requested by the defendant Phillip Himmelfarb;

15. That the Court erred in denying the motion of defendant Phillip Himmelfarb to dismiss the indictment;

16. That the Court erred in failing to grant in full the motion of defendant Phillip Himmelfarb for a Bill of Particulars;

17. That the Court erred in overruling the various objections made by and on behalf of the defendant Phillip Himmelfarb to the various questions propounded by plaintiff's attorney to the various witnesses who testified herein, which questions, objections and rulings will be specifically designated and set forth in the Brief to be filed by and on behalf of appellant herein;

18. That the Court erred in failing to instruct the jury as to Section 145a of the Internal Revenue Code and the law governing the offense in said section set forth, to wit: a misdemeanor embraced within the charge set forth in the indictment, but

constituting a lesser offense than the offense set forth in Section 145b of the Internal Revenue Code—a felony;

19. That the Defendant Phillip Himmelfarb was deprived of a fair trial and was prejudiced as the result of a subpoena duces tecum being served during the course of the trial and in the presence of the jury, upon his co-defendant Sam Ormont, by a marshal of the United States Marshal's office; and

20. That the Assistant United States Attorney was guilty of misconduct in that during the course of the trial and in the presence of the jury, he caused appellant's co-defendant, Sam Ormont, to be served with a subpoena duces tecum by a marshal of the United States Marshal's office.

Dated, at Los Angeles, California, this 15th day of September, 1947.

Respectfully submitted,

/s/ WILLIAM KATZ,

Attorney for Appellant,

Phillip Himmelfarb.

Service of the within and receipt of a copy thereof is hereby acknowledged, this 17th day of September, 1947.

JAMES M. CARTER,

United States Attorney, and

WILLIAM STRONG,

Assistant United States
Attorney.

By /s/ WILLIAM STRONG,

Attorneys for Respondent.

[nEodrsed]: Filed Sept. 23, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11662

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

And

No. 11666

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER DISPENSING WITH PRINTING
OF ORIGINAL EXHIBITS

Good cause therefor appearing, It Is Ordered that none of the original exhibits filed with the clerk of this Court in above causes need be printed within the printed transcript of record, but will be considered by this Court in their original form.

FRANCIS A. GARRECHT,
Senior United States Circuit
Judge.

Dated: San Francisco, Calif., October 30, 1947.

[Endorsed]: Filed October 31, 1947.

In the District Court of the United States in and
for the Southern District of California, Central Division

No. 19138

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS ON AP-
PEAL BY DEFENDANT SAM ORMONT

To the Plaintiff in the Above-Entitled Case, and
to the Honorable James M. Carter, United
States Attorney, Howard B. Calverly, Chief,
Criminal Division, Assistant United States At-
torney, and William Strong, Assistant United
States Attorney, Attorneys for Plaintiff, and
to the Clerk of the Court:

Please Take Notice that the defendant Sam Or-
mont, having on the 24th day of June, 1947, filed
his Notice of Appeal from the judgment made and
entered and the sentence imposed on June 16, 1947,
and the order made and entered on June 16, 1947,
denying said defendant's motion for judgment of
acquittal notwithstanding the verdict, and motion,
in the alternative, for a new trial, said defendant
hereby designates the following portions of the
record, proceedings, and evidence, to be contained
in the record on appeal:

* * * * *

The points on which this defendant and appellant Sam Ormont intends to rely on appeal are:

1. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 1 of the indictment;

2. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 2 of the indictment;

3. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 3 of the indictment;

4. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 4 of the indictment;

5. That the Court erred in refusing to grant those portions of this defendant's motion for a Bill of Particulars which portions were by the Court denied;

6. That the defendant was taken by surprise because of the refusal of the Court to grant his motion for a Bill of Particulars in full;

7. That the Court erred in refusing to continue said case and direct a further Bill of Particulars at the time the case was called for trial on May 21, 1947;

8. That the Court erred in denying this defendant's motion made on the 21st day of May, 1947, to suppress all evidence as against this defendant;

9. That the Court erred in dismissing without the consent of this defendant the first jury impaneled and sworn in this court and cause to try this defendant, which jury was impaneled and sworn on

the 21st day of May, 1947, and which jury was by the Court dismissed and discharged on the 22nd day of May, 1947, without the consent of this defendant;

10. That the Court erred in denying this defendant's motion to dismiss said indictment and case and to enter his plea of once in jeopardy based upon the record in the case and the Minutes of the Court showing that a jury had been duly impaneled and sworn to try the defendant and was then discharged, which motion was made and denied on the 23rd day of May, 1947.

11. That the Court erred in denying the motion of this defendant, made on the 23rd day of May, 1947, for immunity of this defendant against prosecution in this case on the ground that said defendant theretofore, and before the voting and rendition of the indictment herein, had been subpoenaed before the Grand Jury of said court and compelled to give evidence before said Grand Jury against himself, and that he had not previously thereto been advised of his constitutional rights to counsel nor of his constitutional rights to refuse to answer any questions or give any testimony, or that any testimony he might give would be used against him.

12. That the Court erred in overruling defendant's objection to the introduction in evidence of Exhibits 1 through 5, inclusive, and also this defendant's objection, immediately following the offer of said exhibits, to the introduction of any evidence;

13. That the Court erred in holding, as against this defendant's motion to suppress all evidence and to require the plaintiff to furnish a Bill of Particulars and to dismiss the indictment, [272] that said matters had previously been ruled on by another judge, and therefore that such previous ruling was the law of the case;

14. That the Court erred in overruling this defendant's objection to the introduction of any evidence not embraced within the opening statement of the United States Attorney as to what they intended to prove, and particularly as to any evidence pertaining to the withholding of any information from the Government officers, or failure to disclose the sources of income, or any evidence of any matter not covered by the United States Attorney's opening statement;

15. That the Court erred in overruling defendant's objection to the introduction of Exhibit 3;

16. That the Court erred in allowing any of the evidence in this case to be introduced under Count 1 of said indictment upon the ground that there was no proper foundation therefor, in that the Government never established the filing by this defendant of the alleged "Income and Victory Tax report" for the year 1944, as alleged in Count 1 of said indictment, but in variance therewith allowed the prosecution to introduce a totally different instrument and allowed the jury to determine the case on such totally different instrument. to wit, upon an Income Tax return for the year 1944. which was not a part of the charge in said Count of said indictment.

17. That the Court erred in allowing any evidence to be introduced as against this defendant, under Count 1, pertaining to said Exhibit 3;

18. That the Court erred in denying this defendant's motion for acquittal on Count 1 at the close of the prosecution's evidence;

19. That the Court erred in denying this defendant's motion for acquittal on Count 1 at the close of all of the evidence;

20. That the Court erred in refusing to instruct the jury to acquit the defendant Sam Ormont on Count 1;

21. That the Court erred in denying this defendant's motion to strike out all the evidence pertaining to the years 1942 and 1943, and as to Counts 2, 3 and 4, made after said Court had acquitted said defendant on said Counts 2, 3 and 4.

22. That the Court erred in submitting to the jury all of the evidence in said case, and particularly that portion of the evidence in said case pertaining to the alleged offenses in Counts 2, 3 and 4 of said indictment, for the reason that said evidence was not pertinent to any issues in Count 1 of said indictment after this defendant had been acquitted on said Counts 2, 3 and 4, and it was prejudicial error and created a confusion in the minds of the jurors to submit said evidence to said jury.

23. That the Court erred in instructing the jury that they could take into consideration, under Count 1, evidence that was introduced under Counts 2, 3 and 4, for the purpose of determining wilfulness or intention.

24. That the Court erred in instructing the jury as to the law of this case, and particularly in refusing to give the instructions requested by this defendant.

25. That the evidence in this case did not establish beyond a reasonable doubt the guilt of this defendant under Count 1.

26. That the evidence established and disclosed that the verdict and judgment made and entered against defendant Sam Ormont are contrary to law.

27. That the verdict made and entered against this defendant is contrary to the evidence.

28. That the judgment entered against this defendant is contrary to the evidence and to the law.

29. That the evidence against this defendant is manifestly insufficient to support the verdict of the jury.

30. That the evidence against this defendant is wholly insufficient to show the guilt of this defendant beyond a reasonable doubt.

31. That the evidence is wholly insufficient against this defendant to show beyond a reasonable doubt that said defendant wilfully committed any acts charged in Count 1 of the indictment.

32. That the Court erred in denying the motion of defendant Sam Ormont for an acquittal notwithstanding the verdict of the jury, and in denying the motion of this defendant, made in the alternative, for a new trial.

33. That the Court erred in admitting privileged communications between this defendant and his attorney, to wit, Exhibits 51-A, 51-B and 51-C.

34. That the Court erred in giving instructions requested by the prosecution and excepted to by this defendant, and in refusing instructions requested by this defendant, and in refusing instructions requested by his co-defendant Phillip Himmelfarb.

35. That the Court erred in refusing to acquit this defendant, by reason of the fact that the evidence indicated that the defendant cooperated with the Treasury Department, and that the policy of the Treasury Department has been since 1932 or thereabouts and to the present date that it would not recommend anyone for prosecution who cooperated with the Internal Revenue Department, and that without the evidence furnished by the defendant the Treasury Department would not have had any facts upon which to base an indictment against said defendant.

36. That the Court erred in refusing to strike all the evidence and conversations of the Government witnesses, Eustice, Burcher and Phoebus on the ground that said evidence and conversations, made to said witnesses or secured by said witnesses, were so made to said witnesses or secured by said witnesses by promises of immunity, fear or threats made by said witnesses against said defendant.

37. That the Court erred in permitting the witness Eustice to testify to matters of hearsay and to base hearsay evidence upon hearsay and opinion evidence upon hearsay evidence.

38. That the Court erred in permitting the witness Malin to testify over the objection of this defendant, on the ground that said testimony was privileged.

39. That the Assistant United States District Attorney was guilty of misconduct in that during the course of the trial and in the presence of the jury he caused the defendant Sam Ormont to be served with a subpoena duces tecum by a Marshal of the United States Marshal's Office.

40. That the Assistant United States District Attorney was guilty of misconduct in that in his closing argument he made repeated references to other alleged crimes and offenses by repeatedly stating to the jury that the source of the income upon which said defendant attempted to evade income taxes was overcharges, side payments and extra payments received in connection with the sale of meats, without any showing in the evidence that said alleged overcharges, side payments or extra payments were in truth and in fact unlawful.

41. That the Assistant United States District Attorney was guilty of misconduct in that he stated to the jury that a witness who was not called by the defense was accessible and available to the defendant, but that said defendant did not call such wit-

ness, and stated or implied the question that if defendant was innocent why was not such witness called to establish such innocence? All of which said statements were highly prejudicial to defendant and deprived him of a fair trial.

Dated at Los Angeles, California, this 26th day of June, 1947.

BENJAMIN F. KOSDON and
DALY B. ROBNETT,

By BENJAMIN F. KOSDON,
Attorneys for Defendant
Sam Ormont.

Received copy of the within Designation of Record on Appeal, Statement of Points on Appeal by defendant Sam Ormont, this 26th day of June, 1947.

/s/ JAMES M. CARTER,
U. S. Attorney.

By /s/ VELOVIS BARKIS,
Attorney for Plaintiff.

[Endorsed]: Filed June 26, 1947.

No. 11662.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

MAY 15 1948

WILLIAM KATZ
PAUL P. O'BRIEN CLERK
415 Chester Williams Building, Los Angeles 13,
Attorney for Appellant.

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No. 11662.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Introductory Statement.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

Appellant Phillip Himmelfarb, who throughout this brief will be referred to as appellant, and one Sam Ormont were jointly indicted in the United States District Court for the Southern District of California, Southern Division, on January 22, 1947, for allegedly attempting to evade the payment of income tax in violation of Section 145(b), I. R. C., 26 U. S. C. A., 145(b) [Tr. p. 2]. Appellant was named in two counts of the indictment, namely, Count One [Tr. p. 2], in which he and Sam Ormont were jointly charged with attempting to evade the payment of income tax allegedly due and owing by

Sam Ormont for the calendar year 1944 and, Count Two [Tr. p. 3], in which appellant and Sam Ormont were jointly charged with attempting to evade the payment of income tax allegedly due and owing by appellant for the calendar year 1944. Appellant interposed a plea of not guilty to both Counts I and II of said indictment.

During the course of the trial and at the close of the prosecution's case, appellant was acquitted of the charge in Count I of the indictment [Tr. pp. 1225; 1232]. This appeal is from the judgment entered upon the verdict of the jury, finding appellant guilty of the offense charged in Count II of the indictment.

The decidedly major portion of the testimony and exhibits in this case were admitted solely against appellant's co-defendant, Sam Ormont, and only a minor part of the testimony and exhibits were admitted against appellant. Among the major points raised by appellant on this appeal is the fact that the evidence against appellant is manifestly insufficient to support the verdict of the jury and the judgment entered thereon. It is, therefore, a necessary prerequisite to the proper determination of this appeal that the testimony and exhibits admitted against and received on behalf of appellant be delineated from the entire record.

Preliminarily, however, it should be noted that at the very outset of the trial of this case, it was stipulated and agreed, at the suggestion of the trial court, that any motion, objection or stipulation made by either defendant be deemed made on behalf of both defendants, unless such motion, objection or stipulation is specifically disclaimed [Tr. pp. 240-241]; and it was understood and agreed by and between the Court, counsel for the government, and counsel for the respective defendants, throughout the trial

of this case from its very commencement, that all evidence offered by the government is offered and received against defendant Sam Ormont only, unless government counsel avowed or indicated that the evidence is offered against appellant or against both defendants* [Tr. pp. 347, 348, 355, 372, 378, 379, 380, 390, 448, 450, 451, 545, 602, 872, 968, 1044, 1080, 1081, 1086, 1100, 1143, 1144].

*Illustrative of the agreement and understanding had throughout the trial are the following excerpts from the transcripts, indicative of the tenor thereof:

Tr. p. 355:

“Mr. Katz: If the court please, with respect to the defendant Himmelfarb, to avoid making the objection to each question as it is made, I think some stipulation will probably expedite the matter. I don’t want to have to do that.

The Court: If it will be deemed that you have made the objection to all of the questions asked by government counsel without repeating it, and the same ruling made that I have made so far on these objections, unless government counsel avows that the evidence offered is offered also against Himmelfarb.

Mr. Katz: Thank you, Your Honor.”

Tr. pp. 378, 379:

“Mr. Strong: Will counsel stipulate that we can use this photostat in lieu of the original card, that is, Government’s Exhibit 25 for identification, the signature card?

Mr. Robnett: Yes.

The Court: What is it?

Mr. Katz: That is a matter I am not concerned with, but it is still my understanding that until such time as you indicate that you are proceeding against the defendant Himmelfarb, you are proceeding against the defendant Sam Ormont.

Mr. Strong: Yes.”

Tr. p. 448:

“Mr. Katz: That is objected to, if the Court please, on behalf of the defendant Himmelfarb, as not binding upon him in any way, and hearsay as to him.

The Court: The objection will be sustained. I take it, it will not be necessary at each session of the court to renew the

Jurisdiction.

The jurisdiction of the lower court was founded upon Judicial Code, Section 24, as amended, 28 U. S. C. A., Section 41, subdivision 2, and the jurisdiction of this court is founded upon Judicial Code, Section 128, as amended, 28 U. S. C. A., Section 225, subdivision a.

understanding had by counsel, that this is offered only presently as against the defendant Ormont?

Mr. Strong: At the present time the understanding is the same.

The Court: Very well."

Tr. p. 450:

"Mr. Katz: Objected to, if the Court please, as to that question, in so far as the defendant Himmelfarb is concerned—

Mr. Strong: We have agreed as to each question. I have not mentioned his name.

The Court: The objection will be sustained. The jury will receive this evidence as against the defendant Ormont only, and disregard it as to the defendant Himmelfarb.

The Witness: On a calendar year basis.

The Court: It will be assumed that objection will be made to each question, and the same ruling made, as to each one, unless the prosecutor avows that it is offered for connecting the defendant Himmelfarb, or it is obvious from the question that it applies to the defendant Himmelfarb."

Tr. p. 1086:

"Q. (By Mr. Strong): You were asked concerning some invoices which you said you took. I will now show you invoices in evidence which are marked Government's Exhibits 38 and 39 and ask you if you took any one of these invoices.

Mr. Katz: If the Court please, I presume now we are reverting back to where the understanding is that the objection has been made and the same ruling with respect to further questions asked by Mr. Strong.

Mr. Strong: At the present time I am not applying it to the defendant Himmelfarb.

The Court: Very well.

Mr. Katz: He tells me when he is not but I can never tell when he is.

The Court: He is not except when he says he is.

Mr. Strong: That is right, Your Honor."

Statement of Facts.

Appellant, on March 14, 1945, filed with the Collector of Internal Revenue at Los Angeles, California, an income tax return for the calendar year 1944, showing his net taxable income for that year, computed on the community property basis, to be \$4,111.74, and the tax thereon to be \$656.00 [Ex. 4, rec'd in evid., Tr. p. 345]. On the same day, Ruth Himmelfarb, appellant's wife, filed an income tax return with the same Collector and for the same calendar year showing her net taxable income for the calendar year 1944, computed on the community property basis, to be \$4,611.74, and the tax thereon to be \$766.00 [Ex. 5, rec'd in evid., Tr. p. 345]. The amounts of income shown as due on the respective returns of appellant and his wife were paid by them [Tr. p. 363].

On May 24, 1945, there was filed with the Collector of Internal Revenue at Los Angeles, California, an Information Return by Sam Ormont and appellant, as joint venturers, for the fiscal period May 1, 1944 to April 30, 1945, disclosing a net income of \$71,388.84 for that fiscal period, and the distribution thereof to Sam Ormont and appellant equally, to-wit: \$35,694.42 [Ex. 6, rec'd in evid., Tr. p. 383].

Hugh R. Pingree, a government witness, is the manager of the Bank of America, First and Chicago branch, Los Angeles. Pursuant to subpoena, he brought certain records of that bank, disclosing that appellant opened a commercial account on March 14, 1942 [Tr. pp. 380, 383, 559]. Exhibit 32 [rec'd in evid., Tr. p. 386] is a photostatic copy of that signature card [Tr. p. 383]. An application was made for the issuance of a cashier's check by the bank to Acme Meat Co., in the amount of

\$3,150.00, and Exhibit 34 [rec'd in evid., Tr. p. 386], is a photostatic copy of such application [Tr. p. 385]. Exhibit 35 [rec'd in evid., Tr. p. 386] is a photostatic copy of the cashier's check issued pursuant to such application [Tr. p. 385]. Exhibit 36A [rec'd in evid., Tr. p. 386, p. 557], are copies of ledger sheets for that account for the period December 24, 1943 to March 15, 1945 [Tr. p. 386, p. 557].

Ernest Link, a witness for the government, is acquainted with appellant, having known him since 1944 [Tr. p. 393]. He saw appellant performing work on the premises of Acme Meat Co., during 1944 and 1945, and observed appellant make out invoices to customers of Acme Meat Co., compute the amount due from the customers, and compute the weight of the bill with the figure 3, which amount he entered on a list kept in a drawer of a desk in the office of the Acme Meat Co. [Tr. pp. 429, 430]. Mr. Link also saw appellant selling beef and other cuts to the trade [Tr. p. 431]. Mr. Link did not make out the payroll checks, but did audit and check them against the books. There were payroll checks to appellant [Tr. p. 433]. He at one time examined the list on which he had seen appellant make entries, observed that it contained names of customers and amounts opposite such names, some of which were written in the handwriting of appellant and some in the handwriting of Sam Ormont; some were marked paid and crossed out, but he never saw appellant receive any money in connection with that list. Mr. Link did not record any amounts appearing on the list in the books and records of the Acme Meat Co. [Tr. pp. 434-435].

The profits from the Acme Meat Co. for the year 1944 were credited to the account of Sam Ormont on the books and records of Acme Meat Co. [Tr. p. 436].

J. Bryant Eustice, a government witness, is acquainted with appellant, having first become acquainted with him about November 8, 1945, in connection with the performance of his official duties as an agent for the Bureau of Internal Revenue. Mr. Eustice was assigned to conduct an investigation of the 1942, 1943 and 1944 income tax returns of both Sam Ormont and the appellant [Tr. p. 507].

At the time Mr. Eustice made his investigation, he had in his possession the original of Exhibit 4, the photostatic copy of the 1944 income tax return of appellant, and the original of Exhibit 5, the photostatic copy of the 1944 income tax return of Ruth Himmelfarb [Tr. p. 510].

He had not examined Exhibit 32, which is the signature card of the commercial account of appellant in the Bank of America, or Exhibit 33, for identification, the photostatic copy of a deposit slip of appellant, or Exhibit 34, the application signed by Ruth Himmelfarb for a cashier's check, in the amount of \$3,150.00, made payable to Acme Meat Co. [Tr. pp. 515-516].

Mr. Eustice examined the books and records of the Acme Meat Co. in the office of that company, in connection with his investigation into the income tax return of appellant for the year 1944 [Tr. pp. 517-518], and made a transcript of certain accounts therefrom, which are a part of his work papers [Tr. p. 519].

Mr. Eustice, about the middle of November, discussed with appellant his status with reference to the Acme

Meat Co., at which time Mr. Phoebus was present. Mr. Eustice believes he had other discussions respecting appellant's relationship thereto prior to that date [Tr. pp. 887-888].

The examination of the books and records of Acme Meat Co. was made about the latter part of November, 1944 [Tr. p. 950]. On the first occasion that he examined those books and records with reference to the income of appellant for the year 1944, Mr. Phoebus was present [Tr. p. 951].

On that occasion Mr. Eustice did not make a copy of the entries of the records of the Acme Meat Co. with reference to any money paid to or by appellant for the year 1944, but did make such copy about four weeks later. After Mr. Eustice first visited the Acme Meat Co. the books were always available to him and he just went into the office and went to work on the books [Tr. pp. 951-952].

Mr. Eustice did not have the books and records at the time of trial, and last saw them at the office of the Acme Meat Co. [Tr. p. 953].

On the basis of the investigation, Mr. Eustice made a determination as to whether there was any additional income of appellant for the year 1944 over and above that reported in the income tax return of appellant for that year [Tr. pp. 953-954].

Samuel J. Phoebus, a witness for the government, is a special agent with the Bureau of Internal Revenue, who investigated the tax return of the appellant for the year 1944, to determine whether or not he had paid the proper tax [Tr. p. 884].

The first time he met appellant was on May 18, 1945, at the plant of the Acme Meat Co., when he spoke to him in connection with such investigation.

Mr. Phoebus could not clearly recall whether or not he told appellant who he was, or showed appellant his identification. He had previously identified himself to other people there in the plant, but not to appellant, and Mr. Phoebus cannot say that he did at any time tell appellant who he was [Tr. pp. 885-886].

Mr. Phoebus was present in November, 1945, when he and Mr. Eustice discussed the matter with appellant, and on that occasion neither Mr. Phoebus nor Mr. Eustice stated to appellant that any statements he might make or disclosures concerning his business might be used against him in a criminal prosecution [Tr. pp. 886-887].

David L. Gorgerty, a government witness, is an insurance broker. He had previously seen Exhibits No. 44 [rec'd in evid., Tr. p. 914] and No. 45 [rec'd in evid., Tr. p. 923]. Exhibit 44 is the insurance policy which Mr. Gorgerty caused to be reissued on April 3, 1944, in lieu of the policy that had previously been issued, at the request of appellant about September or October, 1943. The policy, Exhibit 44, was issued in the name of appellant, doing business as Phillip's Meat Co., and thereafter, on August 1, 1944, the beneficiary was changed by endorsement on the policy [Tr. pp. 909-912].

Sometime in July, 1944, at a plant appellant was operating at 3301 East Vernon Avenue, Mr. Gorgerty had a discussion with appellant respecting the change of beneficiary. Mr. Ormont was present at such conversation and appellant introduced him to Mr. Gorgerty, as his partner,

and informed Mr. Gorgerty that he wanted the fire insurance on the stock changed so that it would cover Mr. Ormont and himself, doing business as Acme Meat Co. [Tr. pp. 912-913].

Exhibit 44 is a true and correct copy of the original policy in the hands of appellant and Sam Ormont, it having been delivered to them [Tr. p. 914].

Exhibit 45 consists of five monthly reports of values for the period May to October, 1944, inclusive, on which the beneficiary reports each month the amount of merchandise and stock on hand, for the purpose of computing the premium for Exhibit 44, which is a monthly reporting fire insurance policy [Tr. pp. 914-915].

Mr. Gorgerty is acquainted with the signature of appellant, and the signature on Exhibit 45 is the signature of appellant. These monthly reports were made out by Mr. Gorgerty, the information appearing thereon having been obtained from appellant. Appellant signed the reports and they were sent to the company by Mr. Gorgerty on or about the date each bears [Tr. pp. 916-917].

The endorsement on the policy to transfer it to Acme Meat Co. was made on May 20, 1944, and the conversation with appellant was had in May, a few days prior to the endorsement, and not sometime in July, as previously stated [Tr. pp. 919-920].

At this conversation appellant told Mr. Gorgerty that he wanted the policy previously issued to Phillip's Meat Co. transferred to the Acme Meat Co. Appellant at that time told Mr. Gorgerty that he and Mr. Ormont were partners, doing business as the Acme Meat Co., in substantially that language [Tr. pp. 925-926].

The typewritten matter that appears on each page of Exhibit 45 was typed in by Mr. Gorgerty, or by someone in the office of Mr. Gorgerty, and at his request. The writing, Acme Meat Co., that appears on the first page of Exhibit 45, and on the line following the typed name "Phillip Himmelfarb, dba," is in Mr. Gorgerty's handwriting. The first page of that exhibit was signed by appellant in blank and delivered to Mr. Gorgerty, who filled in everything which appears on that page. The second, and all subsequent pages of Exhibit 45, were filled in and signed by Mr. Gorgerty, he having signed the name "Phillip Himmelfarb" thereto [Tr. pp. 929-931, incl.]

The figures appearing on that exhibit were either telephoned to Mr. Gorgerty, or obtained by him at the plant, and Mr. Gorgerty at his office filled in all of Exhibit 45, save and except the signature on the first page. Appellant never saw the last four or five sheets that constitute Exhibit 45, and when appellant signed the first sheet it was blank. Appellant signed enough reports in blank for a twelve-month period [Tr. pp. 931-932].

The first page of Exhibit 45 was one of the twelve statements signed in blank by appellant in connection with the policy issued to appellant Phillip Himmelfarb doing business as Phillip's Meat Co. This first page was the only one used of the twelve statements signed in blank by appellant. Mr. Gorgerty did not use the remainder of the twelve statements signed in blank because of the transfer of the policy to Acme Meat Co., but proceeded to sign the reports for appellant in connection with the transferred policy [Tr. pp. 932-933].

The pages comprising Government's Exhibit 45 are the original reports—not carbon copies [Tr. pp. 933-934].

A week or so after the first conversation heretofore alluded to, Mr. Gorgerty had another conversation at the plant with appellant, at which Sam Ormont was also present. At that time appellant told Mr. Gorgerty to sign appellant's reports and send them in because they were too busy. This conversation took place after the policy was transferred from Phillip's Meat Co. to Acme Meat Co. [Tr. pp. 935-937].

The insurance policy, Exhibit 44, is a true copy of the original except that the underwriter has made some notations on it which are not included on the original policy and the words "Sam Ormont", and the line drawn through Phillip's Meat Co., and the name "Acme Meat Co.", written in pencil, are not on the original policy [Tr. pp. 941-943].

The original policy was never delivered to them; it was the rider that was delivered to appellant and Ormont when the policy was transferred to Acme Meat Co. The rider was handed to appellant [Tr. pp. 943-944].

William S. Malin, a witness on behalf of the government, is a certified public accountant and has been since 1928 [Tr. p. 1091]. On July 31, 1945, he sent to Donald Bircher the financial statements, Exhibits 50-A and 50-B, dated July 30, 1945. He saw the signature, Phillip Himmelfarb, affixed to Exhibit 50-B by appellant [Tr. pp. 1112-1116]. The letter, Exhibit 50-D was prepared by Mr. Malin, signed by appellant, and sent to Mr. Bircher by Mr. Malin [Tr. pp. 1117-1118], together with Exhibits 50-A and 50-B [Tr. p. 1122].

The information set forth on Exhibit 50-B was obtained by Mr. Malin from appellant. The cash on hand is the amount he had deposited in the bank, which Mr. Malin

obtained from bank balances; the war bonds were bonds at cost; the four-family flat and all the assets, automobile, truck, adding machine, came from appellant's records; the Acme Meat Co. receivables is what appellant said was receivable from Acme Meat, which Mr. Malin believes was salaries accrued, and the small items were what appellant said he owed [Tr. pp. 1121-1122].

Mr. Malin prepared the original return, of which Exhibit 6 is a copy, and the signature on the last page, William F. Malin, is his—Mr. Malin's signature.

The information "miscellaneous enterprises" inserted in that return, was obtained by Mr. Malin from Mr. Mirman, the attorney [Tr. p. 1126]. Item 12 on the front page of that return, "other income—state nature and sources—miscellaneous income, \$71,388.84", was likewise obtained from that attorney [Tr. p. 1127]. The information on the fourth page of that return, "Phillip Himmel-farb—50%—\$35,694.42," is according to the statement of appellant that they divided it fifty-fifty [Tr. pp. 1127-1128].

The information, "joint venture", typed in on the fourth page of the return under the section headed "Questions" and after the second item "Nature of organization (partnership, syndicate, pool, joint venture, etc.)" was obtained by Mr. Malin from appellant [Tr. pp. 1128-1129].

The only record Mr. Malin saw with reference to the sums shown on the return, "50 per cent, \$35,694.42 to Sam Ormont", and "50 per cent, \$35,694.42 to appellant," was a slip of paper seen by Mr. Malin on May 23 [Tr. pp. 1130-1131].

The signatures on Exhibit 6 were placed on the return in Mr. Malin's presence, and the signature, Phillip Him-

melfarb thereon, was signed by appellant [Tr. pp. 1132-1133].

Donald Bircher, a government witness, is and for twenty years has been a special agent in the Bureau of Internal Revenue.

During May, 1945, he was assigned to conduct an investigation of the income tax of Sam Ormont and appellant for the years 1942, 1943 and 1944 [Tr. p. 1134].

Mr. Bircher had previously seen Exhibits 50 A, B and D, and Exhibit 52. These exhibits were received by him by mail from Mr. Malin in the envelope, Exhibit 52. Mr. Bircher had no discussion with appellant respecting those documents [Tr. pp. 1152-1153].

On May 24, 1945, Mr. Bircher spoke to appellant at the Acme Meat Co. plant, told him what he was doing, and showed him his credentials, of which Exhibit 54 is a copy [Tr. pp. 1169-1171].

The government having rested [Tr. p. 1225], and a motion for acquittal having been made [Tr. p. 1225] and granted as to Count I, but denied as to Count II [Tr. p. 1232], appellant proceeded with his defense.

Exhibit GG [rec'd in evid. Tr. p. 1265] is the income tax return filed by appellant for the year 1945, and Exhibit HH [rec'd in evid. Tr. p. 1265], is the income tax return for the calendar year 1945, filed by Ruth Himmelfarb, his wife.

Ralph Kibbee, a witness on behalf of appellant, is and for approximately ten years has been a certified public accountant, licensed to practice in the State of California and before the Treasury Department of the United States. As such certified public accountant he has pre-

pared income tax returns on both a calendar and fiscal year basis, on a cash and accrual basis, and has verified and audited returns prepared by others [Tr. pp. 1267-1268].

Mr. Kibbee has previously seen Exhibits 4, 5, 6, GG and HH [Tr. pp. 1268, 1269].

Mr. Kibbee has recomputed the 1944 return of appellant by allocating a part, to wit: \$13,641.11 of the income from the joint venture reported in the 1945 return, Ex. GG, to the 1944 return [Tr. p. 1270]. The amount so added to the 1944 return produced an amount which corresponded to the sum set forth in the Bill of Particulars and in Count II of the indictment as the income of appellant for the year 1944. The total amount of the tax as recomputed and calculated on the basis of the net income as shown on the 1944 return, plus the additional sum of \$13,641.11, is \$5,843.91 [Tr. pp. 1271-1272].

Mr. Kibbee also recomputed the 1945 return filed by appellant on the basis of the net income as shown by such return, less the sum of \$13,641.11, allocated to the year 1944, and the amount of tax for the 1945 return as so recomputed is \$1,881.85 [Tr. pp. 1272-1273].

The total amount of the tax for the years 1944 and 1945, shown by the returns filed by appellant for these years is \$8,891.97. The total amount of the tax for the years 1944 and 1945 as recomputed by Mr. Kibbee by the addition of the sum of \$13,641.11 to the year 1944, and the deduction of that amount from the income for the year 1945, is \$7,725.78. The difference in dollars and cents between these two totals is \$1166.19, which, with respect to the returns as filed for the years 1944 and 1945, represents an overpayment [Tr. p. 1273].

Substantially the same result is obtained by the recomputation of the returns filed for Ruth Himmelfarb, utilizing the same methods of allocation and calculation, and the total overpayment for both appellant and Ruth Himmelfarb, his wife, would be approximately double the amount of \$1166.19 [Tr. pp. 1273-1274].

Mr. Kibbee recomputed the returns for the calendar years 1944 and 1945 utilizing a sum as an addition to the 1944 and a deduction from the 1945 income, other than and different from the amount used in the aforementioned computation, to wit: \$11,979.63, representing $245/365$ of appellant's share of the profits of the joint venture [Tr. p. 1276]. That fraction represents the number of days of the joint venture falling within the calendar year 1944, $120/365$ days falling within the calendar year 1945 [Tr. p. 1275].

The amount of the 1944 tax, as recomputed on the fractional share basis is \$5005.59 for 1944 and \$2454.39 for 1945, resulting in a total for those years, as recomputed on the fractional share basis, of \$7459.98 [Tr. p. 1276].

The difference between such total and the total tax for 1944 and 1945, shown by the returns filed for said years, is \$1431.99, which, with respect to the returns filed for those years, represents an overpayment [Tr. pp. 1276-1277].

Substantially the same result is obtained by the recomputation on the fractional share basis of the returns filed by Ruth Himmelfarb [Tr. p. 1277].

The total payment by both appellant and his wife, on the basis of such recomputation, is substantially double the sum of \$1431.99 [Tr. p. 1277].

Appellant and his wife have paid the tax shown to be due by the 1944 and 1945 returns [Tr. pp. 1280-1281].

Mr. Kibbee was first retained in connection with this case the day before he appeared and testified. His calculations were based upon Government's Exhibits 4, 5, 6 and Defendant's Exhibits GG and HH. He did not have any discussions regarding these matters with appellant, or Mrs. Ruth Himmelfarb, and does not know of his own knowledge whether any of the figures or statements in those returns are or are not true. He accepted them as shown and assumed them to be true and correct because they were so reported. Mr. Kibbee simply did a mathematical calculation based upon the assumptions indicated by him. In his schedules and in his testimony he assumed that if certain sums were taken from the 1945 reported income and added to the 1944 income, a different result would be obtained. He does not know whether any of the sums came from one year or the other, and based his answer on the returns themselves [Tr. pp. 1282-1283].

The division of the income on the basis of 245/365 is not an arbitrary division, but is an accepted manner of dividing income where the details are unknown. Mr. Kibbee's computation as to how much tax was overpaid or underpaid, as well as other matters testified to by him, assume certain matters to be true, of which he has no personal knowledge [Tr. p. 1283].

If the sum of \$11,979.63 is allocated to the year 1944 as earned in that year and added to the amount of \$4611.54 appellant reported for that year, then the amount which should have been reported for 1944 is \$16,591.17, and the tax which should have been reported and paid, based upon the assumption that such are the amounts that appellant earned in 1944, would have been \$5005.59, and the same or almost the same amount would have been reported and paid by Ruth Himmelfarb [Tr. p. 1285].

Mr. Kibbee's computations were all made on the community basis, allocating half to Mrs. Himmelfarb and half to appellant [Tr. p. 1286].

Joe Abrams, a salesman, Pete Bedder, engaged in the life insurance business, Frederick L. Rey, an insurance broker, Louis Vincent, and Chauncy Bowlus Chauncy, called as witnesses on behalf of appellant, have known appellant for periods varying from 3 or 4 to 15 years, have transacted business with him, which transactions involve the payment of bills and indebtedness, and have transacted business with other persons who have transacted business with appellant. Each of these men know appellant's reputation in the community in which appellant lives, for truth, honesty and integrity, and for paying his bills and meeting his obligations; and appellant's reputation is very good.

The foregoing is believed to be a full, fair and complete statement of all of the pertinent evidence offered and received against and on behalf of appellant, delineated from the record in this case.

Statement of Questions Involved.

- I. Is there substantial evidence against appellant to support the verdict of the jury and the judgment entered thereon?
- II. Did the trial court err in denying appellant's motions for an acquittal of the offense charged against him in Count II of the indictment made at the close of the government's case, and the motion for such acquittal made at the close of all of the evidence?
- III. Did the trial court err in admitting in evidence, over appellant's objection:
 - (a) Exhibit 34;
 - (b) Exhibit 35;
 - (c) Exhibit 36A;
 - (d) Exhibit 50A; and
 - (e) Exhibit 50B,and in denying appellant's motion to strike from the record:
 - (a) Exhibit 32;
 - (b) Exhibit 34;
 - (c) Exhibit 35; and
 - (d) Exhibit 36A?
- IV. Was counsel for the government guilty of misconduct:
 - (a) In making repeated references in his opening and closing argument to the jury of other alleged crimes and offenses purportedly committed by appellant, of which there was no evidence against appellant, and by repeatedly stating to the jury that the sources of the income upon which appellant allegedly

attempted to evade income taxes was overcharges, side payments and extra payments unlawfully collected and received in connection with the sale of meat, notwithstanding the fact that there was no evidence against appellant showing that such income or any income received by him was received from overcharges, side payments, or extra payments received in connection with the sale of meat, or in any other unlawful transactions; and

(b) In stating to the jury that witnesses not called by appellant were accessible and available to him, and stating or inferring that if appellant was innocent such witnesses would have been called by him, and that the reason such witnesses were not called was that the testimony of such witnesses would be adverse to appellant.

V. Did the trial court err in refusing to charge the jury as requested by appellant in his proposed Instructions to the Jury:

- (a) No. 17;
- (b) No. 22;
- (c) No. 25;
- (d) No. 27;
- (e) No. 29;
- (f) No. 30; and
- (g) No. 35?

VI. Did the trial court err in denying appellant's motions for an acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial?

Specification of Assigned Errors Relied Upon.

SPECIFICATION OF ERROR NO. I—

(Assignment of Error Nos. 1, 2, 3, 4 and 5.)

The evidence against appellant is manifestly insufficient to support the verdict of the jury and the judgment entered thereon, and such verdict and judgment are contrary to law and the evidence [Specs. 1, 2, 3, 4 and 5; Tr. pp. 1630-1631];

SPECIFICATION OF ERROR NO. II—

(Assignment of Error Nos. 6 and 7.)

The trial court erred in denying appellant's motions for an acquittal of the offense charged against him in Count II of the indictment made at the close of the government's case [Tr. pp. 1225, 1232], and at the close of all the evidence [Tr. pp. 1352, 1363; Specs. 6 and 7; Tr. p. 1631];

SPECIFICATION OF ERROR NO. III—

(Assignment of Error Nos. 9 and 10.)

The trial court erred in admitting, over appellant's objection, Exhibits 34, 35, 36A [Tr. pp. 385-386], 50A and 50B [Tr. pp. 1108, 1109, 1112, 1114], and in denying appellant's motion to strike from the record Exhibits 32, 34, 35, 36A [Tr. pp. 1363-1367, incl.] 44 and 45 [Tr. pp. 946-947; Specs. 9 and 10; Tr. p. 1631];

SPECIFICATION OF ERROR No. IV—

(Assignment of Error Nos. 11 and 12.)

Counsel for the government was guilty of misconduct in addressing improper argument to the jury [Specs. 11 and 12; Tr. p. 1632];

SPECIFICATION OF ERROR No. V—

(Assignment of Errors Nos. 13 and 14.)

The trial court erred in refusing to charge the jury as requested by appellant in this proposed Instructions No. 17 [Tr. pp. 112, 1442], No. 22 [Tr. pp. 113, 1443], No. 25 [Tr. pp. 123, 1443], No. 27 [Tr. pp. 114, 1443], No. 29 [Tr. pp. 124, 1443], No. 30 [Tr. pp. 125, 1443], and No. 35 [Tr. pp. 126, 1444; Specs. 13 and 14; Tr. p. 1663].

SPECIFICATION OF ERROR No. VI—

(Assignment of Error No. 8.)

The trial court erred in denying appellant's motions for an acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial [Tr. pp. 134, 135, 1608; Spec. 8; Tr. p. 1631].

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

The Evidence Against Appellant Is Manifestly Insufficient to Support the Verdict of the Jury and the Judgment Entered Thereon, and Such Verdict and Judgment Are Contrary to Law and the Evidence.

Appellant in his statement of the facts of this case was mindful of the rule that the evidence must be viewed in the light most favorable to the government. Similarly, appellant in asserting the complete insufficiency of the evidence to sustain the verdict, is mindful of the fact that when so viewed there must be an absence of substantial evidence to support the finding. However, where, as in the instant case the verdict of the jury is without evidentiary support the judgment will be reversed.

U. S. v. Schachtrup, 7th Cir. (1944), 140 F. (2d) 415, 418;

Strickland v. U. S., 5th Cir. (1946), 155 F. (2d) 167, 168;

Edenfield v. U. S., 5th Cir. (1940), 112 F. (2d) 931, 932;

Mortensen v. U. S. (1944), 322 U. S. 369, 374;

U. S. v. Wishnatzki, 2nd Cir. (1935), 77 F. (2d) 357, 360;

Dahly v. U. S., 8th Cir. (1931), 50 F. (2d) 37, 46;

Wiborg v. U. S. (1896), 163 U. S. 632.

Again, where as in the instant case, all the evidence adduced against appellant is as consistent with innocence as with guilt, it is the duty of this court to reverse the judgment against him.

Graceffo v. U. S., 3rd Cir. (1931), 46 F. (2d) 852, 853;

Karchmer v. U. S., 7th Cir. (1932), 61 F. (2d) 623;

Yoffe v. U. S., 1st Cir. (1946), 153 F. (2d) 570, 572, 573;

U. S. v. Thatcher, 3rd Cir. (1942), 131 F. (2d) 1002, 1003;

Hammond v. U. S., C. A. D. C. (1942), 127 F. (2d) 752, 753;

Neal v. U. S., 8th Cir. (1939), 102 F. (2d) 643, 648.

Evidence which is consistent with two conflicting hypotheses tends to prove neither.

Neal v. U. S., 8th Cir. (1939), 102 F. (2d) 643, 648;

Gunning v. Cooley (1930), 281 U. S. 90, 94; 50 S. Ct. 231; 74 L. Ed. 720;

Stevens v. The White City (1932), 285 U. S. 195, 204; 52 S. Ct. 347; 76 L. Ed. 699;

Svenson v. Mutual Life Ins. Co. of New York, 8th Cir. (1937), 87 F. (2d) 441, 443.

And proof of circumstances even though consistent with guilt but which are not inconsistent with innocence will not support a conviction.

Spalitto v. U. S., 8th Cir. (1930), 39 F. (2d) 782, 784;

Van Gorda v. U. S., 8th Cir. (1927), 21 F. (2d) 939, 942;

Cravens v. U. S., 8th Cir. (1932), 62 F. (2d) 261, 274;

McClintock v. U. S., 10th Cir. (1932), 60 F. (2d) 839, 842.

With the foregoing principles as our criteria, we proceed to evaluate the evidence in the record against appellant to determine if there is any substantial evidence therein which excludes every other hypothesis than that appellant attempted to evade the payment of income tax due and owing by him for the year 1944.

Directing our attention first to the testimony, and secondly to the exhibits adduced against appellant, we find:

(1) The first witness through whom any testimony was offered and received against appellant was Hugh R. Pingree, the branch manager of the Bank of America [Tr. p. 380]. He merely identified records of the commercial account maintained by appellant at that bank [Tr. pp. 383, 385, 386].

Neither Mr. Pingree nor any other witness at any time testified respecting the information contained on or the transactions reflected by the bank records, identified by Mr. Pingree, offered and received in evidence.

The utter failure of the government in any way to connect these exhibits, as well as other exhibits offered and received against appellant, with the offense charged against him, will be subsequently discussed and elaborated upon in this brief. It is sufficient at this point, however, to note that the testimony of Mr. Pingree did not adduce one single fact proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(2) The second witness through whom any testimony was offered and received against appellant was Ernest Link [Tr. p. 393]. The sum and substance of his testimony was that he saw appellant working on the premises of the Acme Meat Co. performing services pertaining to

the business of that company [Tr. pp. 429, 430, 431]. This fact, either standing alone or when added to the testimony of Mr. Pingree, does not result in the establishment of a single circumstance proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(3) The third witness through whom any testimony was offered and received against appellant was J. Bryant Eustice. He, in essence, stated that as an agent for the Bureau of Internal Revenue, he was assigned to make an investigation of appellant's income tax returns [Tr. pp. 507, 508] and in connection therewith examined the books and records of Acme Meat Co., made a transcript of certain accounts therein [Tr. pp. 517-519], and discussed with appellant his relationship to that company [Tr. pp. 887-888].

It is submitted that the testimony of Mr. Eustice, either standing alone or when added to the preceding testimony of Mr. Link and Mr. Pingree, does not result in the development of a single fact which proves or tends to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(4) The fourth witness through whom any testimony was offered and received against appellant was Samuel J. Phoebus. He testified that as a special agent of the Bureau of Internal Revenue, he investigated the income tax return of appellant for the year 1944 [Tr. p. 884]; that he met appellant on May 18, 1945, at the Acme Meat Co., spoke to him on that day, and on May 23, 1945, in connection with such investigation [Tr. pp. 884-885].

It is self-evident that this testimony, either standing alone, or when added to the testimony of the three pre-

ceding witnesses, Mr. Eustice, Mr. Link and Mr. Pingree, does not present a scintilla of evidence proving or tending to prove that appellant attempted to evade the payment of any income tax due or owing by him for the year 1944.

(5) The fifth witness through whom any testimony was offered and received against appellant was David L. Gorgerty, the insurance broker. He merely identified the insurance policy, Exhibit 44, and the monthly reports, Exhibit 45, and testified that appellant introduced Sam Ormont to him as appellant's partner [Tr. pp. 909-914].

It cannot be gainsaid that this testimony standing alone, or when added to the preceding testimony adduced against appellant, does not establish one solitary fact proving or tending to prove that appellant attempted to evade the payment of any income tax due or owing by him for the year 1944.

(6) The sixth witness through whom any testimony was offered and received against appellant was William S. Malin, a certified public accountant.

The import of his testimony is that appellant signed the financial statement, Exhibit 50-B [Tr. pp. 1112-1116], and the letter, Exhibit 50-D [Tr. pp. 1117-1118], which together with the unsigned financial statement, Exhibit 50-A, were sent by Mr. Malin to Mr. Donald Bircher on July 31, 1945 [Tr. pp. 1112, 1115, 1118]; and the information set forth on Exhibit 50-B was obtained by Mr. Malin from appellant and appellant's records [Tr. pp. 1121, 1122]. Mr. Malin prepared the information return, of which Exhibit 6 is a copy, and the information thereon came in part from appellant and in part from Mr. Mirman, an attorney [Tr. pp. 1125-1128].

It is self-evident that the testimony of this witness, as distinguished from what may be established by the documents identified by him which will hereinafter be separately analyzed, either standing alone or when added to the testimony of the preceding witness, does not result in an iota of evidence proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(7) The seventh and final witness through whom any testimony was offered and received against appellant, was Donald A. Bircher, a special agent in the Bureau of Internal Revenue, who averred that he was during May, 1945, assigned to conduct an investigation of the income tax of appellant for the years 1942, 1943 and 1944 [Tr. p. 1134], and that he, Mr. Bircher, received the documents, Exhibits 50-A, 50-B and 50-D, by mail from Mr. Malin, but had no discussion with appellant respecting those documents [Tr. pp. 1152, 1153].

It is clear that the testimony of Mr. Bircher, either standing alone or when added to the testimony of the preceding witnesses, does not create a single circumstance proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

It therefore is obvious that any substantial evidence that the appellant committed the offense of which he was convicted, if such evidence exists at all, must be found in the exhibits offered and received against him.

We, therefore, proceed to analyze each of such exhibits to determine if such documents contain or comprise such evidence.

These exhibits, totalling fourteen in number, will be considered individually and collectively in the light of all of the testimony in the record against appellant, narrated in the Statement of Facts set forth herein, as well as set forth in the preceding portion of this discussion evaluating such testimony.

(1) EXHIBIT No. 4, the first exhibit offered and received against appellant, is the Individual Income Tax Return filed by appellant for the calendar year 1944 [Tr. p. 345]. Not one word of testimony was given by any government witness respecting this exhibit.

Exhibit 4 does not in any way disclose that appellant, during that calendar year, received any income in addition to or in excess of the income reported in such return; it does not in any way indicate that the gross income and taxable net income therein declared was not the true and correct gross and taxable net income of appellant for the calendar year 1944; nor does it in any way appear from that exhibit that the income tax reported and paid by him for the calendar year 1944 was not the income tax which was due and owing by appellant for that year.

In short, Exhibit 4 does not in and of itself give rise to a single fact proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(2) EXHIBIT No. 5 was the second exhibit offered and received against appellant. It is the Individual Tax Return filed for the calendar year 1944 by Ruth Himmelfarb, the wife of appellant [Tr. p. 345]. Exhibit 5 is the counterpart of appellant's return, and what has been said in the preceding paragraphs respecting Exhibit 4 applies with equal force to this exhibit.

Exhibit 5 in and of itself does not, standing alone or in conjunction with Exhibit 4, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(3) EXHIBIT No. 6, the third exhibit offered and received against appellant [Tr. p. 383], is a Partnership Information Return filed by appellant and Sam Ormont, as joint venturers, for the fiscal period May 1, 1944, to April 30, 1945, inclusive. It discloses a total net income of \$71,388.84 for appellant and Sam Ormont, as joint venturers, during that fiscal period, distributed equally to them.

The only testimony given against or for appellant by any government witness respecting this exhibit was the testimony of William Malin [Tr. pp. 1125-1128], heretofore narrated.

Exhibit 6 does not in any way indicate or disclose that appellant received any income in the calendar year 1944 which was not reported by him in the income tax return, Exhibit 4, for that calendar year. The income of appellant from the joint venture declared in the information return, Exhibit 6, was reportable by appellant, and the income tax thereon was payable on or before the 15th day of March of the calendar year following the calendar year in which such fiscal year ended.

Internal Revenue Code, Sec. 188, 26 U. S. C. A. 188.

The fiscal period for which the information return, Exhibit 6, was filed, having ended on April 30, 1945, the income distributable to appellant for such period was reportable and the income tax thereon was payable on or before March 15, 1946. Appellant did so report such in-

come [Ex. GG, Tr. p. 1265], and paid the tax thereon [Tr. pp. 1280-1281].

Exhibit 6 does not, alone or in conjunction with Exhibits 4 and 5, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(4) EXHIBIT No. 32, the next and fourth exhibit offered and received against appellant [Tr. p. 386], is a signature card for the commercial account opened and maintained by appellant, since 1942, at the Bank of America, First and Chicago branch, Los Angeles, California [Tr. pp. 380-383].

Not a single word of testimony was given by any witness respecting this exhibit, save and except the identification thereof by Hugh Pingree, the branch bank manager [Tr. pp. 380-383]. No attempt was ever made by the government to connect this exhibit with the offense charged against appellant, which fact will be separately discussed and more fully treated in a subsequent portion of this brief in connection with another assignment of error. Suffice to state at this point that appellant has been at a complete loss to understand the purpose, significance or relationship of this exhibit to this case and the offense charged against him.

It is self-evident that Exhibit 32 does not, alone or in conjunction with Exhibits 4, 5, and 6, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(5) EXHIBIT No. 34, the next and fifth exhibit offered and received against appellant [Tr. p. 386], is an application by Ruth Himmelfarb, dated January 20, 1945,

for a cashier's check, payable to the order of Acme Meat Co., in the sum of \$3150.00.

What has heretofore been said respecting Exhibit 32 applies with equal vigor to Exhibit 34, and this exhibit likewise does not, alone or in conjunction with Exhibits 4, 5, 6 and 32, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(6) EXHIBIT No. 35, the sixth exhibit offered and received against appellant, is the cashier's check payable to Acme Meat Co., in the amount of \$3150.00, issued on January 20, 1945, pursuant to the application of Ruth Himmelfarb aforementioned [Tr. p. 386].

What has heretofore been said in the preceding paragraphs respecting Exhibits 32 and 34 applies *in toto* to Exhibit 35, and this exhibit too does not, alone or in conjunction with Exhibits 4, 5, 6, 32 and 34 prove, or tend to prove, that appellant attempted to evade any income tax due or owing by him for the year 1944.

(7) EXHIBIT No. 36A, the seventh exhibited offered and received against appellant [Tr. pp. 386, 557], is comprised of a number of ledger sheets of the commercial account of appellant at the aforementioned branch bank for the period from December 24, 1943, to March 22, 1945.

What has heretofore been said in the preceding paragraphs respecting Exhibits 32, 34 and 35, applies completely and precisely to Exhibit 36A, and this exhibit does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34 and 35, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(8) EXHIBIT No. 44, the next and eighth exhibit offered and received against appellant [Tr. p. 914], is the insurance policy transferred by endorsement from appellant, doing business as Phillip's Meat Co., to appellant and Sam Ormont, doing business as Acme Meat Co. [Tr. pp. 912-913].

It is hardly necessary to labor the point that the transfer by endorsement of an insurance policy, whether properly or improperly caused to be made or done, does not constitute the offense denounced by Section 145(b) of the Internal Revenue Code, and that Exhibit 44 does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35 and 36A, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(9) EXHIBIT No. 45, the ninth exhibit offered and received against appellant [Tr. p. 923], is comprised of five monthly reports made in connection with the insurance policy, Exhibit 44 [Tr. pp. 914, 915]. Each of these monthly reports was completely filled in by Mr. Gorgerty, and with the exception of the first report, signed by appellant in blank, were signed by Mr. Gorgerty, who, pursuant to instructions from appellant so to do, signed appellant's name thereto [Tr. pp. 928-933].

It is again obvious that these reports, Exhibit 45, is no more efficacious in establishing a violation of the offense herein charged against appellant than is the insurance policy, Exhibit 44, and that Exhibit 45 does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A and 44, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(10) The next exhibits, the tenth and eleventh offered and received against appellant, are EXHIBITS No. 50A and No. 50B [Tr. p. 1116]. These two exhibits are treated herein as one and discussed together because they are identical statements of the net worth of appellant as of April 30, 1945, except that No. 50A is unsigned, whereas No. 50B bears the signature of appellant, preceded by the phrase: "The above statement is correct to the best of my knowledge and belief."

The only testimony respecting the contents of this statement was given by William Malin, a government witness, who testified that the amount shown thereon as cash on hand, in banks, was obtained by him from bank balances, and the other items shown on that exhibit were obtained from appellant's records, or based upon what appellant told him [Tr. pp. 1121-1122].

No attempt was made by the government to show that this statement of net worth, Exhibits 50A and 50B, was incorrect or untrue, or that any part or portion of appellant's assets or liabilities, as of April 30, 1945, represented income of appellant for the year 1944 in excess of the amount reported by and upon which the tax was paid for said year. Nor was any effort whatever made by the government to establish any connection between the statement of appellant's net worth as of April 30, 1945 or any of the assets or liabilities therein set forth, and the offense of which appellant stood accused.

It is axiomatic that a statement of net worth does not raise a presumption or create an inference that income was received in any given year, and certainly no presumption or inference that any income which may have been

received in any given year was in excess of the amount reported by the taxpayer for such year.

Exhibits 50A and 50B, standing alone or in conjunction with Exhibits, 4, 5, 6, 32, 34, 35, 36A, 44 and 45, did not prove or tend to prove that appellant attempted to evade any income tax due and owing by him for the year 1944.

(11) EXHIBIT No. 50D, the twelfth exhibit offered and received against appellant [Tr. pp. 1118-1119], is a letter dated July 30, 1945, signed by appellant and addressed to Donald Bircher, Special Agent of the Bureau of Internal Revenue.

Mr. Bircher was therein advised by appellant that the total amount received by appellant from the joint venture was \$35,694.42; that a cumulative record only was kept of the amounts received, and that the profits were distributed at irregular intervals.

This amount of \$35,694.42, it will be observed, was the precise amount shown by Exhibit 6, as distributed or distributable to appellant for the fiscal period May 1, 1944 to April 30, 1945, inclusive, and is the precise sum reported by and included as income in the individual income tax return filed by appellant for the calendar year 1945, Exhibit GG [Tr. p. 1270].

Exhibit 50D does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A and 50B, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(12) EXHIBIT No. 52 the thirteenth exhibit offered and received against appellant, is simply the envelope in which Mr. Malin mailed to Mr. Donald Bircher the Exhibits 50A, 50B and 50D [Tr. pp. 1152-1153].

It is wholly without significance and is mentioned here solely for the purpose of noting every bit of evidence in the record against and for appellant.

Exhibit 52 does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B and 50D prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(13) EXHIBIT No. 54, the last exhibit offered by the government and received against appellant, is a copy of the credentials of Donald O. Bircher, Special Agent of the Bureau of Internal Revenue.

What has been said in the preceding paragraph respecting Exhibit 52 is entirely applicable to this exhibit, and Exhibit 54 does not, alone or together with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D and 52, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

EXHIBIT GG, the first exhibit offered by and on behalf of appellant, and the sixteenth exhibit of the total number of exhibits offered against and for appellant [Tr. p. 1265], is the individual income tax return of appellant for the calendar year 1945.

Not a single word of testimony was given by any government witness respecting this exhibit, and the only testimony with respect thereto was given by Mr. Ralph

Kibbee, the certified public accountant, who detailed the computations made by him regarding this exhibit and Exhibits 4 and 5.

This exhibit does not in any way disclose that the gross or taxable net income reported by appellant in the return filed by him for the calendar year 1944, Exhibit 4, was not the true and correct gross and taxable net income reportable by appellant for the year 1944, nor does Exhibit GG in any way indicate that appellant, during the calendar year 1944, received any income in addition to or in excess of the income reported in his return for such calendar year, Exhibit 4, or that the income tax reported and paid by appellant for the calendar year 1944 was not the true and correct tax which was due and owing by him for that year.

In brief, Exhibit GG does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D, 52, and 54, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

EXHIBIT HH, the second exhibit offered by and on behalf of appellant, and the seventeenth exhibit of the total number of exhibits offered against and for appellant [Tr. p. 1265], is the individual income tax return filed for the calendar year 1945 by Ruth Himmelfarb.

Exhibit HH is the counterpart of appellant's return, Exhibit GG, and what has been said in the preceding paragraph respecting Exhibit GG, applies fully to this exhibit.

Exhibit HH does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D, 52, 54, and GG, prove or tend to prove that appellant

attempted to evade any part of the income tax due or owing by him for the year 1944.

The third exhibit, numbered Exhibit II, offered and received by and on behalf of appellant, and the eighteenth and last of the total number of all exhibits received for and against appellant, is comprised of a series of checks payable and paid to the Collector of Internal Revenue for the income tax due and owing for the calendar year 1944, as shown by Exhibits 4 and 5.

Exhibit II does not, standing alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D, 52, 54, GG and HH, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

It thus becomes crystal clear from the analysis of all of the evidence in the record, both the testimony and the exhibits offered and received against and for appellant, viewed in the light most favorable to the government, that there is a complete absence of any substantial evidence to support the finding that appellant was guilty of the offense charged in Count II of the indictment.

It must be remembered that not only must the evidence show that appellant attempted to evade a substantial part of the income tax due and owing by him for the year 1944, but there must be substantial evidence that such attempt was willful.

“It has always been the law (unless otherwise prescribed by statute) that to convict one of crime requires the proof of an intention to commit a crime.”

Nosowitz v. U. S., 2nd Cir. (1922), 282 Fed. 575, 578.

The statute which appellant was charged to have violated, to-wit: Section 145(b), Internal Revenue Code, 26 U. S. C. A. 145(b), by its express language makes willfulness one of the essential elements of the offense. It provides, in so far as is material here,

“ . . . Any person who *willfully* attempts in any manner to evade or defeat any income tax imposed by this chapter shall, in addition to other penalties provided by law, be guilty of a felony”

It has been repeatedly held that a willful intent is one of the essential elements in the proof of the crime of evasion of federal income taxes.

U. S. v. Zimmerman, 7th Cir. (1939), 108 F. (2d) 370, 374;

Malone v. U. S., 7th Cir. (1938), 94 F. (2d) 281, 286;

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820, 823;

Heindel v. U. S., 6th Cir. (1945), 150 F. (2d) 493, 496, 497.

Not only is the record in this case against appellant wholly barren of any substantial evidence that he attempted to evade any part of the income tax due and owing by him for the year 1944, but it is completely devoid of any evidence that appellant willfully attempted so to do.

This Court is weighed with the responsibility of examining all the evidence to determine where in this record

there is substantial evidence offered and received against appellant that he violated the statute in question.

U. S. v. Wise, 7th Cir. (1939), 108 F. (2d) 379, 383.

To paraphrase the language of the court in *Karchmer v. U. S.*, 7th Cir. (1932), 61 F. (2d) 623, at least the evidence against appellant in this case was, to put it conservatively, not less consistent with innocence than with an attempt to evade the payment of taxes.

In the words of the Court in *Candler v. U. S.*, 5th Cir. (1944), 146 F. (2d) 424, 426:

“The evidence is as consistent with innocence as with guilt, and fails signally to show *willful intent*, and we are not willing to convict the defendant on the evidence as disclosed by the record here.”

This Court, after a consideration of the facts in the record against appellant in this case, must inevitably be led to say, as was said by the Court in *Williams v. U. S.*, C. A. D. C. (1944), 140 F. (2d) 351, 352:

“Accordingly, we have read the testimony and reach the conclusion that to permit the conviction to stand would result in a miscarriage of justice. To sustain it we should have to find, at least, that the evidence is more consistent with guilt than with innocence. Considered from that aspect we are of the opinion that not enough is shown.”

SPECIFICATION OF ERROR NO. II.

The Trial Court Erred in Denying Appellant's Motions for an Acquittal of the Offense Charged Against Him in Count II of the Indictment Made at the Close of the Government's Case and at the Close of All the Evidence.

At the close of the government's case, appellant moved the court to acquit him of the offense charged against him in both Counts I and II of the indictment [Tr. p. 1225]. The motion so made was granted as to Count I and denied as to Count II [Tr. p. 1232].

At the close of all the evidence, appellant renewed his motion for an acquittal as to Count II of the indictment [Tr. p. 1352]. This motion too was denied [Tr. p. 1363].

It has been held by a long line of decisions that unless there is substantial evidence of facts which exclude every other hypothesis than guilt, it is the duty of the trial judge to acquit the defendant, and where all the evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a judgment against the accused.

Graceffo v. U. S., 3rd Cir. (1931), 46 F. (2d) 852, 853;

Nicola v. U. S., 3rd Cir. (1934), 72 F. (2d) 780, 786;

Yoffe v. U. S., 1st Cir. (1946), 153 F. (2d) 570, 572, 573;

Nosowitz v. U. S., 2nd Cir. (1922), 282 Fed. 575, 578.

It has heretofore been established that the evidence offered and received against and for appellant was entirely consistent with his innocence, and that there is a complete absence of any substantial evidence to support his conviction.

The trial court erroneously denied that motion made by appellant for an acquittal of the offense charged against him in Count II of the indictment, an error which this Court must notice and correct.

U. S. v. Wishnatzki, 2nd Cir. (1935), 77 F. (2d) 357, 360.

SPECIFICATION OF ERROR NO. III.

The Trial Court Erred in Admitting, Over Appellant's Objection, Exhibits 34, 35, 36A, 44, 45, 50A and 50B, and in Denying Appellant's Motion to Strike From the Record Exhibits 32, 34, 35 and 36A.

Exhibits 32, 34, 35 and 36A were offered by the government and received in evidence by the Court upon the statement and assurance of government counsel that said exhibits would be "connected" or "tied up" [Tr. pp. 384-386, incl.]. At the time Exhibits 34, 35 and 36A were offered in evidence, appellant interposed the objection that said exhibits pertained to a period beyond the year (1944), involved in the offense charged and were not within the issues [Tr. pp. 385-386].

Exhibit 32, the signature card of appellant for the commercial account maintained by him, Exhibit 34, the application of Ruth Himmelfarb, dated January 20th, 1945, for a cashiers check to Acme Meat Co., in the amount of \$3150.00 could only become relevant to and material, or be "connected" with the offense charged

against appellant if it were shown that such bank account and cashiers check, issued pursuant to the application, Exhibit 34, were relevant to and connected with the offense charged against appellant. This, as will be seen, was never done.

Exhibit 35, the cashiers check, dated January 20, 1945, payable to Acme Meat Co., in the amount of \$3150.00, issued pursuant to the aforementioned application, could only become material and relevant to, or be "connected" with the offense charged against appellant if it were shown that: (a) the funds with which the cashiers check was purchased were the funds of appellant; (b) which constituted or represented income for the calendar year 1944; and (c) upon which appellant had paid no income tax. This was never done. No attempt was made by the government so to do.

As heretofore pointed out by appellant, not a single word of testimony was given by any witness respecting this check, the source of the proceeds with which it was purchased, the time at which, the person by whom, or the manner in which such proceeds were acquired.

This court will search the record herein in vain for a solitary particle of evidence respecting this exhibit.

Had Exhibit 35 been a cashiers check payable to appellant instead of a cashiers check issued by or for him, it would, at best, be of questionable significance, for even under those circumstances, the bare fact that a taxpayer received and cashed a check for a substantial amount would not in and of itself suffice to establish that income tax was due on account of it.

But, where, as here, a taxpayer issues or causes a check to be issued to another, it is wholly without relevancy. Such a payment does not and cannot constitute income and no income tax does or can become due by reason of such payment.

Exhibit 36A, comprised of a number of ledger sheets of the commercial account of appellant for the period December 23, 1943 to March 22, 1945, incl., could only become material, relevant to and "connected" with the offense charged against appellant if it were shown that: (a) the money deposited therein was income of appellant; (b) for the year 1944; and (c) upon which appellant had paid no income tax. This too was never done; no attempt was made by the government so to do. Not a single word of testimony was given by any witness respecting this exhibit, the source or nature of the funds deposited therein, the time they were acquired, or any other facts respecting the deposits to, the withdrawals from, or balances in said account. This court will search this record in vain for a solitary particle of evidence respecting this exhibit.

The bare fact standing alone that appellant has from time to time deposited money in a bank account does not prove that such deposits were income, or that he owed a tax thereon.

Gleckman v. U. S., 8th Cir. (1935), 80 F. (2d) 394, 399.

At the close of all of the testimony appellant moved the court to strike from the records Exhibits 32, 34, 35, and 36A [Tr. pp. 1363-1367]. This motion was made upon the grounds that said exhibits were not in any way

connected with this case; no foundation was laid for them; they covered periods prior and subsequent to the period involved in this proceeding; were not within the issues, and no showing had been made that they related in any way to appellant's income or income tax [Tr. pp. 1363-1367]. The motion to strike said exhibits was denied by the Court. In so doing the Court erred.

Evidence which has no bearing on the matters in issue should be excluded.

Nicola v. U. S., 3rd Cir. (1934), 72 F. (2d) 780, 782, 783;

Caughman v. U. S., 4th Cir. (1919), 258 F. (2d) 434, 435, 436;

Nigro v. U. S., 8th Cir. (1941), 117 F. (2d) 624, 631, 632;

Meyers v. U. S., 9th Cir. (1945), 147 F. (2d) 663, 666, 667.

A judgment will be reversed where irrelevant evidence prejudicial to the accused was admitted.

Meyers v. U. S., 9th Cir. (1945), 147 F. (2d) 663, 666, 667;

Nicola v. U. S., 3rd Cir. (1934), 72 F. (2d) 780, 782, 783;

Nigro v. U. S., 8th Cir. (1941), 117 F. (2d) 624, 631.

The admission of bank records without any evidence connecting same with the offense charged is error.

Kittrell v. U. S., 10th Cir. (1935), 79 F. (2d) 259, 262;

Williams v. U. S. (1897), 168 U. S. 382, 395, 396, 397.

The admission of bank records without any evidence connecting same with the offense charged is reversible error where accused may have been prejudiced thereby.

Williams v. U. S. (1897), 168 U. S. 382, 395, 396, 397.

The prejudice resultant to appellant from the admission of these exhibits and the refusal of the court to strike them was enhanced by the fact that the jurors were permitted by the court to take all of the exhibits to the jury room [Tr. p. 1591], and aggravated by the argument to the jury by counsel for the government respecting these exhibits pertaining to appellant's bank account.

Mr. Strong, counsel for the government, in his opening argument stated to the jury [Tr. p. 1493]:

"Besides that, you have in evidence here the bank records of Mr. Himmelfarb, which show you how much money got into his bank account."

And in his closing argument [Tr. p. 1559]:

". . . How about his bank account. That is in evidence. Of course nobody testified as to those books. If the books show on their face what they purport to show, if the records are clear, you can't have testimony. The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

Guilt may not be established by speculation or conjecture.

Karchmer v. U. S., 7th Cir. (1932), 61 F. (2d) 623;

Kassin v. U. S., 5th Cir. (1937), 87 F. (2d) 183, 184;

Denner v. U. S., 6th Cir. (1945), 147 F. (2d) 286.

Notwithstanding this basic and salutary rule of law, the jury was invited to assume that appellant received income and evaded the payment of tax thereon merely because the exhibits herein discussed "which show you how much money got into his (appellant's) bank account" were admitted in evidence even though "of course nobody testified as to those books." (Parenthesis ours.)

Exhibit 44 is the insurance policy and Exhibit 45 is the monthly reports made in connection with such policy, as hereinbefore stated. Prior to the introduction of Exhibit 45, appellant requested permission to examine, on *voir dire*, Mr. Gorgerty, the witness who identified that exhibit, which request the court denied [Tr. pp. 918-920]. Subsequently appellant moved the court to strike Exhibits 44 and 45 from the record upon the ground that the copy of the insurance policy, Exhibit 44, was received in evidence upon the testimony of Mr. Gorgerty that it was a true copy of the original, which was upon cross-examination established not to be the fact, and that as to Exhibit 45, no foundation whatsoever had been laid, and that said reports had been filled in and signed by Mr. Gorgerty, except for the one report signed in blank by appellant. This motion was likewise denied [Tr. pp. 946-947].

No conceivable reason appears for the introduction in evidence of these exhibits other than to prejudice appellant by implying that appellant was capable of irregular conduct in improperly causing such policy to be transferred from himself to Sam Ormont and himself, doing business as Acme Meat Company.

Lest it be thought that Exhibits 44 and 45 were offered and introduced in evidence for the purpose of establishing the relationship of partners between appellant and Sam

Ormont, and to refute the existence of the relationship of employer and employee, we direct this Honorable Court's attention to the position of the government as reflected by the opening argument to the jury of counsel for the government [Tr. pp. 1464-1465]:

“But again that is another fact. If everything is open and aboveboard, why are they concealing the fact that they are partners? Why all this to-do over whether they are partners or not? *I can't figure out whether it makes any difference or not, whether they are or aren't, but I know it makes this difference, that everything that is concealed tends to show that the person who you charge as having violated it or not, it tends to show how he operates, and it is one of the facts that you should take into consideration as to the element of willfulness.*” (Emphasis ours.)

Not the slightest relevancy existed between Exhibits 44 and 45 and the offense charged against appellant. Conduct of a party, whether proper or improper, having no connection with or relationship to the payment of income taxes, may not be considered in determining whether the acts of the accused respecting his income and income tax, was or was not willful.

Once again we find that the court erred in denying appellant's motion to strike irrelevant and immaterial exhibits prejudicial to appellant—a prejudice which was enhanced by the permission given by the court to the jury to take all of the exhibits to the jury room, and aggravated by the argument addressed to the jury by counsel for the government respecting these exhibits.

Exhibits 50A and 50B, the court will recall, are the statements of net worth of appellant as of April 30, 1945.

Identical with each other in all respects, except that 50A is unsigned, whereas 50B was signed by appellant.

Appellant objected to the introduction of said exhibits on the grounds that they were incompetent, irrelevant and immaterial, that no foundation had been laid therefor, that same were encompassed within the rule respecting privileged communications, that no *corpus delicti* had been established, and that said exhibits were not within the issues of the case and were subsequent in point of time to the offense charged against appellant. This objection was overruled [Tr. pp. 1108-1109, 1112-1114, incl.].

It has heretofore been pointed out that not a solitary fragment of evidence was introduced to attempt to establish that any part or portion of appellant's assets or liabilities shown by such statement of net worth reflected income of appellant for the year 1944, in excess of the amount reported by appellant, or at all, or to establish any connection between appellant's net worth as of April 30, 1945, or any of the assets or liabilities therein set forth and the offense of which appellant stood accused.

It is fundamental that the mere fact that a person may have acquired and is possessed of assets of marked value is not proof in and of itself that no income tax had been paid thereon, or that such assets were acquired by the evasion of income taxes.

Similarly, it is basic that the mere fact that appellant, on April 30, 1945, was possessed of a substantial net worth, did not give rise to a presumption or create any inference that the acquisition or possession of such net worth was the result of an evasion or attempt to evade the payment of income tax.

Gleckman v. U. S., 8th Cir. (1935), 80 F. (2d) 394, 399.

Yet the government so treated and regarded appellant's statement of net worth.

Counsel for the government in his opening statement to the jury referred to these Exhibits 50A and 50B [Tr. p. 1493], and expressly invited the jury to fasten guilt upon appellant by speculation and conjecture in the absence of relevant and cogent evidence thereof. Once more the prejudice resultant from the admission, over objection of immaterial exhibits, was enhanced by the permission given to the jury to take all exhibits to the jury room, and aggravated by the argument to the jury by counsel for the government.

SPECIFICATION OF ERROR NO. IV.

Counsel for the Government Was Guilty of Misconduct in Addressing Improper Argument to the Jury.

Because of the fact that the substantially major portion of the evidence in this case was offered and received against Sam Ormont alone, and a comparatively small amount of the entire evidence was offered and received against appellant, it was of prime importance to appellant that only such evidence as was received against and for him be considered by the jury in determining his guilt or innocence.

Counsel for the government, while purporting from the very outset of his argument to consider the cases of appellant and Sam Ormont separately [Tr. p. 1450], in apparent recognition of the legal necessity for so limiting the evidence, however repeatedly referred to and applied against appellant evidence which was not in the record against appellant, and if in the record at all, was there only against his co-defendant, Sam Ormont.

Thus counsel for the government in the portion of his opening argument purportedly directed against Sam Ormont stated [Tr. p. 1470]:

“You know what was going on with the sale of meat. You know what those payments are. I am not even going to mention them by name. It would be insulting your intelligence to mention them,—these extra, unreported side payments, that he took with the left hand, the amount of money, and put in the left pocket, and then he puts in the Acme books, and takes the extra money with the right hand, and puts it in the right-hand pocket. Oh, that was a joint venture. That was separate and apart. Simultaneously, on the same sale of meats, he has engaged in two separate enterprises, one selling at the price shown on the invoices, and the other getting this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebus told you.”

It will be observed that the personal pronoun “he,” referring to Mr. Ormont, is used throughout the aforequoted statement. In the last sentence thereof, however, Mr. Strong refers to

“. . . this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebus told you.”

This reference is and can only be a reference to appellant as well as to Sam Ormont, and by such statement the jury was told that appellant and Sam Ormont split “unreported,” “additional,” “extra,” “side money,” notwithstanding the fact that the record was wholly barren of

any evidence that appellant received money from such sources or money that may be so characterized. Not a particle of evidence was introduced against appellant designating the source of any funds received by him, or the nature of the transactions in which such funds were earned.

Any doubt that this portion of the argument of government counsel was directed against appellant as well as Sam Ormont, although purportedly made against Sam Ormont, is dispelled by the immediately succeeding statements made by Mr. Strong to the jury, in which the singular pronoun "he" is changed to the plural form, as follows [Tr. pp. 1470-1471]:

"And *they* take this money, and *they* put it away, Mr. Ormont particularly, and on the 24th day of May, 1945, when he is caught, he rushes in and files a return. But even in the return which he filed on that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money. It says, Business or Profession: Miscellaneous enterprises. What miscellaneous enterprises? What enterprises separate and apart from the sale of meat by the Acme Meat Company?" (Emphasis ours.)

The pronoun "he" has now become "they," before reverting again to "he." This change of pronouns from the singular to the plural, which effectively applies against appellant, evidence which is not in the record as to him, is not an isolated instance. Two short paragraphs later Mr. Strong again shifts from the pronoun "he" to "their" in the following statement, still purportedly made against Sam Ormont [Tr. pp. 1471-1472]:

"I ask you, ladies and gentlemen, if that kind of testimony will tell, whether that kind of evidence will

convince you that *their* income tax was reported properly, or if it was on a fiscal year basis? Money that comes in as extra payment, money collected, which the right hand keeps from the left hand, money, after the investigation starts in, reported as miscellaneous enterprises, miscellaneous income; no expense, \$70,000, split, in two years—do you think that is a *bona fide* business venture, on a fiscal year basis, when he rushed in, on May 24th? I won't go into that. You know what transpired on that date, and his Honor will instruct you as to what you should consider in that connection, and you will decide for yourself if it is a *bona fide* joint venture, *bona fide* business enterprise on a fiscal year basis, or is this just a method concocted up in a hurry, after the investigation has started, to account for money, to excuse it, to report it, to get out of any possible charges of violation." (Emphasis ours.)

Once more we have a reference to highly prejudicial matters dehors the record that other unrelated offenses of which no evidence exists in this record against appellant were committed by him.

A moment or two later, counsel for the government made the following statement [Tr. pp. 1472-1473]:

"Do you think *they* had a separate joint venture, apart from the Acme Meat Company? Even in this return it does not say anything about a partnership. You will remember Mr. Gorgerty testified they said they were partners, and they had an insurance policy, during the same period, and Mr. Gorgerty said that they are partners. They gave the insurance policy as partners. What does this joint venture say? It does not say from what; it does not say anything. 50 per cent of the money to Mr. Ormont, and 50 per cent

to Mr. Himmelfarb. Just take the first eight months of that, which was 1944; take 8/12ths of \$70,000, allocate it to each defendant, and then you will know exactly about the income, because there are no books or records. You will know about how much money *they* earned in 1944. That money *they* did not report, although *they* knew *they* earned it in 1944; knew it was part of the operation of the Acme Meat Company; and knew it was side money, in connection with the sale of meat. *They* did not report it.

“Ask yourself this: Do you think *they* would have reported it at any time, if *they* had not been investigated? Ask yourself. If you find this return is phony, just a means of getting out of a trap, after *they* find themselves being investigated, after *they* found that *they* were caught, disregard this return for whatever it is worth.” (Emphasis ours.)

Here we find consistent references to “they,” although the argument is one which is still purportedly directed against Sam Ormont. Here too we once more have an application against appellant of evidence which, if in the record at all, is not in the record against appellant.

Thus, no evidence was offered or received against appellant that:

- (a) Any portion of the earnings of the joint venture, reported in Exhibit 6, the fiscal return for the period May 1, 1944, to April 30, 1945, was earned in the year 1944;
- (b) That there are no books or records;
- (c) That appellant received any money which he did not report;
- (d) That appellant received any money which he knew was earned in 1944;

(e) That appellant knew it was part of the Acme Meat Co.;

(f) That appellant knew that such money was “side-money”;

(g) That the return, Exhibit 6, is “phony, just a means of getting out of a trap”; or

(h) That such return was made “after they found that they were caught.”

The aforequoted statement was immediately followed by a statement in which there was a complete admixture of the singular and plural pronouns, to wit [Tr. pp. 1473-1474]:

“*They* don’t report on how or where the money came from, but that same day, after it was filed—*they* filed it in the morning; Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus, and had a long discussion. You remember the record. *He* told them where the money was from. You remember *he* tried to get out of saying it was extra payments; side money. *He* made it sound like gifts. *They* disclosed at that time what that money was, and, if everything was above board, clean, honest, and not a violation of law, why didn’t *they* put it on the return? Why did *they* have these hieroglyphics? Miscellaneous income, \$71,000.00. No explanation; nothing. And there was some testimony that *they* told Mr. Bircher and Mr. Phoebus *they* were afraid of some other agency finding it out. You remember *they* stated that, and that’s why *they* concealed it. That is why *they* did not report it.

“But it does not make any difference why *they* did not, so long as it was wilfully and deliberately not reported, and it should have been reported then, so

far as I am concerned. It is up to you to decide finally, in Count I, whether there was a wilful attempt to evade and defeat the tax which was due.” (Emphasis ours.)

In the statement last aforequoted are a number of statements dehors the record as against appellant, including the assertions that:

(a) Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus and had a long discussion on the same day the fiscal return, Exhibit 6, was filed;

(b) That “they,” which would include appellant, “disclosed at that time what that money was”;

(c) That at that time “they” told Mr. Bircher and Mr. Phoebus “they” were afraid of some other agency finding it out; and

(d) That is why “they” concealed it and why “they” did not report it.

The foregoing statement was shortly followed by the following, which while expressly directed to “he,” Mr. Ormont, is so completely entwined with and inseparable from the aforequoted statements that counsel for the government might just as well have continued to use the pronoun “they” [Tr. p. 1475]:

“Now some questions as to whether these things were gifts, this money he received on the side was gifts. I will leave that to you. You have had experience and you have been in the world long enough. Do you think that in a business which produced an income that was reported of \$12,000 for the year 1944, do you think that the customers of that business brought in \$70,000 in gifts? That is a new

term for those side payments, gifts, voluntary gifts. You don't have to pay it, but what do you get if you don't? You know what those payments were."

Both the repetition of the foregoing statements dehors the record as well as the shifting back and forth from the "he" to the "they" and "their" is markedly consistent throughout the argument of government counsel.

It admittedly is sufficiently difficult for a jury to segregate in their minds the evidence received against one defendant alone from the evidence received against his co-defendant only, and we submit that such a task became utterly impossible when counsel for the government applied the evidence received solely as against appellant's co-defendant, Sam Ormont, to the appellant, and expressly invited and requested the jury to apply and consider against appellant such matters dehors the record.

The errors committed by counsel for the government in his opening argument were re-emphasized by him with deadly effect in his closing argument, and the resultant prejudice became eradicable. At almost the commencement of his closing argument, Mr. Strong stated to the jury [Tr. pp. 1545-1546]:

"Now as I said at the outset, this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, and in connection with that sale of meat *they* collected money which was shown on the invoices and reported on the books. You heard that testimony.

"Besides that, on the other hand, *they* collected some more money. *They* like to call it gifts. *They* like to call it something else. But you know what it is, it is overcharges, extra money on the side. Did

they collect that as a special or separate venture? Was that a separate enterprise that *they* had, as though you would run one factory on one side of the street under one name and another factory on the other side where you are doing something else? No, the evidence here shows that it is exactly the same transaction. You sell the same meat, you get part of the payment with the left hand and part of the payment with the right hand. So of course after they got caught by the investigators, and the investigators came in, *they* have to get some other reason to explain this away to get out of something that *they* have fallen into. So they come up with the joint venture idea. We have talked enough about that joint venture.” (Emphasis ours.)

It is evident from the foregoing statement that by the time Mr. Strong commenced his closing argument he had apparently convinced himself that the offense charged against appellant was not an attempt to evade income tax but some offense relating to overcharges and the sale of meat, for he tells the jury in so many words that “. . . this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, . . .,” and “Besides that, on the other hand, they collected some more money. . . .”; “. . . it is overcharges, extra money on the side” [Tr. pp. 1545-1546].

And again [Tr. p. 1547]:

“*They* explained why *they* didn’t report themselves as partners, because it might embarrass *them* with some other Government agencies. And *they* explained to you why *they* would rather call these separate payments gifts, because it might embarrass *them* with some other Government agencies. Well, you know

what *they* are doing here. *They* are selling meat, getting money with the right hand and the left hand, and *they* are reporting the money that *they* get with the left hand and not reporting the money that *they* get with the right hand. It is as simple as all that.” (Emphasis ours.)

Appellant feels that it is unnecessary to further labor this point. Suffice to say that in this instance too this court will search the record in vain to find any evidence therein against appellant pertaining to or supporting the statements repeatedly made by government counsel in his argument to the jury respecting the matters herein discussed.

During the course of his closing argument counsel for the government stated to the jury that two persons, to wit: Mr. Malin and Mr. Moody, were accessible as witnesses to appellant, were not called by appellant, and inferred that they would have given testimony adverse and prejudicial to appellant, if called. This statement by Mr. Strong is as follows [Tr. pp. 1560-1561]:

“Then Mr. Katz tells you, look at these records. One was prepared by Mr. Moody, he is an accountant; and the other is prepared by Mr. Malin. So what? Where is Mr. Moody? He is the accountant for the defendant and he has something to say in the defense of the defendant, why didn’t the defendant put him on the stand to testify? Why didn’t they put Mr. Malin on to testify as to what he knows about that? I had him on the stand for a limited purpose, as much as I could get. Did they call him back? Was there something with reference to the preparation of that return which corroborates the defendant Himmelfarb? Why didn’t they put Mr.

Malin on the stand to tell you about it then? He is just as accessible to them as he is to me. And if it is their defense, it is their witness. They didn't put Mr. Moody on, they didn't put Mr. Malin on."

There was, of course, no evidence that Mr. Moody was accessible as a witness to anyone, but without regard to the accessibility or non-accessibility of either or both of these persons, the fact remains the burden is not upon appellant to prove his innocence, but the duty rests upon the government to prove his guilt beyond a reasonable doubt. It was consequently improper and prejudicial for counsel for the government to state to the jury that certain witnesses might have been called, or weren't called, or could have been called to establish the innocence of appellant, and to infer that such witnesses were not called because their testimony would have been adverse to appellant.

The charge by an assistant U. S. Attorney in his argument respecting the failure of defendant to call witnesses in his behalf resulted in the deprivation of the presumption that defendant was innocent.

McKnight v. U. S., 6th Cir. (1899), 97 Fed. 208, 211.

Misconduct of counsel and improper argument in extreme cases warrants a reversal.

Berger v. U. S. (1935), 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629;

Williams v. U. S. (1897), 168 U. S. 382, 398, 42 L. Ed. 509, 18 S. Ct. 92;

Weathers v. U. S., 5th Cir. (1941), 117 F. (2d) 585, 586;

Ippolito v. U. S., 6th Cir. (1940), 108 F. (2d) 668, 670, 671;

U. S. v. Sprengel, 3rd Cir. (1939), 103 F. (2d) 876, 884;

Turner v. U. S., 8th Cir. (1929), 35 F. (2d) 25;

Fontanello v. U. S., 9th Cir. (1927), 19 F. (2d) 921;

Sischo v. U. S., 9th Cir. (1924), 296 Fed. 696, 697;

Fitter, et al. v. U. S., 2nd Cir. (1919), 258 Fed. 567, 572.

Appellant is well aware of the fact that he did not cite the misconduct of government counsel as such during the course of argument and request the court to admonish the jury to disregard as improper Mr. Strong's argument to them. It is necessary, however, that the question of the effect of appellant's failure so to do be approached by this court with a realistic viewpoint, and with a knowledge of appellant's position and the situation then confronting him. First and foremost, appellant at and prior to the time of argument, knew from declarations theretofore made by the trial court that the trial judge was laboring under the misapprehension that because appellant and Sam Ormont had jointly filed the information return, Exhibit 6, and there was testimony in the record against Sam Ormont alone as to where he, Sam Ormont, obtained such money, that the jury could draw an inference from the testimony in the record against Sam Ormont alone that appellant obtained such income in the same manner or from the same place, notwithstanding the fact that the testimony from which such inference was to be drawn was not in the record against appellant [Tr. pp. 1424-1425].

Thus, appellant knew that he was fore-doomed with respect to any such objection. The interposition of an objection and the overruling thereof by the court would merely emphasize such improper argument and more forcefully impress it upon the minds of the jurors. Even if the jury were admonished to disregard these improper statements, upon objection by appellant and request to the court so to do, the prejudicial effects of such statements were such that they could not and would not be removed by an admonition.

Appellate courts must take cognizance of the fact that at times admonition will not remove the prejudicial effects of misconduct of counsel or improper argument addressed to the jury.

August v. U. S., 8th Cir. (1918), 257 Fed. 388, 393;

Latham v. U. S., 5th Cir. (1915), 226 Fed. 420;

Skuy v. U. S., 8th Cir. (1919), 261 Fed. 316.

In *Latham v. U. S.*, 5th Cir. (1915), 226 Fed. 420, 425, the court in its opinion concerning this point, said:

“Every one must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression it still enters and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial.”

Where the error is one which is seriously prejudicial, it will be noticed and corrected by an appellate court, notwithstanding the absence of objection.

In *Skuy v. U. S.*, 8th Cir. (1919), 261 Fed. 316, 320, it was said anent this question:

“The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince . . . and even if it were tenable this is a trial for an alleged crime; it involves the liberty of a citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment.”

In *Latham v. U. S.*, *supra*, the court made this further pertinent observation:

“The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant’s counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his argument and statements to the testimony of the witnesses, in order that no right of the defendant is violated.”

SPECIFICATION OF ERROR NO. V.

The Trial Court Erred in Refusing to Charge the Jury as Requested by Appellant in His Proposed Instructions Nos. 17, 22, 25, 27, 29, 30 and 35.

Appellant in his Proposed Instruction No. 17 [Tr. p. 112] requested the trial court to instruct the jury as follows:

“You are instructed that it is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable doubt, that whatever act or acts was or were done by the defendants was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then I instruct you that no crime has been committed, and it will be your duty to find the defendant Phillip Himmelfarb not guilty.”

The court refused so to do, which refusal the appellant excepted to on the ground that said proposed instruction is a proper statement of the law and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 112, 1442].

The court is upon request required to give a specific instruction cast in the language of the foregoing instruction, and the charge by the court of the presumption of innocence or the element of “willfulness” does not dispense with such necessity.

Appellant in his Proposed Instruction No. 22 [Tr. p. 113] requested the trial court to instruct the jury as follows:

“You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or caused to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, and you are unable to determine from the evidence whether such return was or was not false or fraudulent, or if you have a reasonable doubt as to whether such return was or was not false or fraudulent, you must find the defendant Phillip Himmelfarb not guilty.”

The court refused to so instruct the jury, which refusal appellant excepted to on the ground that said proposed instruction is a correct statement of the law and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. p. 1443].

Appellant's proposed instruction No. 22 is a proper statement of the law.

Malone v. U. S., 7th Cir. (1938), 94 F. (2d) 281;

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820;

Spies v. U. S. (1943), 31 U. S. 492, 87 L. Ed. 418, 63 S. Ct. 364.

The general charge that the burden is upon the government to prove the guilt of the defendant beyond a reasonable doubt as to all of the elements of the offense charged did not dispense with the necessity for giving such requested instruction.

Appellant in his Proposed Instruction No. 25 [Tr. p. 123] requested the trial court to instruct the jury as follows:

“You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, and that in the preparation and filing thereof defendant Phillip Himmelfarb was acting under a mistake of fact respecting, or was in ignorance of, the truth or falsity of the matter set forth in such return, you must find the defendant Phillip Himmelfarb not guilty.”

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 123, 1442].

A taxpayer is not guilty of a violation of Section 145 (b) of the Internal Revenue Code in preparing and filing an income tax return under a mistake of fact respecting, or in ignorance of the truth or falsity of the matter therein set forth.

Hargrove v. U. S., 5th Cir. (1938), 67 F. (2d) 820;

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

An accused is entitled to a specific instruction that the jury must acquit him if they find that his income tax was prepared and filed under a mistake of fact or in ignorance

of the truth or falsity of the matters set forth therein, and the general instruction respecting willfulness does not dispense with the requirement to give upon request such specific instruction.

Appellant in his Proposed Instruction No. 27 [Tr. p. 114] requested the trial court to instruct the jury as follows:

“You are instructed that in a prosecution for wilfully attempting to evade income taxes the Government must prove not only that the defendants attempted wilfully to defraud it, but must establish that a tax in addition to what the defendants had already paid remains owing. Therefore, if you find from the evidence that the defendant Phillip Himelfarb paid all of the income tax due and owing by him for such calendar year 1944, or paid an amount in excess of the income tax due and owing by him for such calendar year 1944, you must find him not guilty of Count II of the indictment, irrespective of whether he did or did not wilfully attempt to evade income taxes for such year.”

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 114, 1443].

The charge that it is unnecessary for the government to prove the precise amount of tax which was due on the income of appellant as alleged in the indictment, and that it is sufficient if the government establishes that the true taxable income was substantially in excess of the amount reported in the return, does not dispense with the necessity for giving the aforequoted specific instruction.

Appellant in his Proposed Instruction No. 29 [Tr. p. 124] requested the trial court to instruct the jury as follows:

“You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed the income tax return referred to in Count II of the indictment, and that such return did not set forth the true and correct net income and the amount of tax due and owing thereon, as a result of mere negligence or carelessness of defendant Phillip Himmelfarb in making such return, you must find the defendant Phillip Himmelfarb not guilty.”

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 124, 1443].

A taxpayer who files an income tax return which because of negligence or carelessness does not set forth the true and correct net income and amount of tax due and owing thereon, is not guilty of a violation of Section 145 (b) of the Internal Revenue Code.

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

The requirement to give a specific instruction that appellant was entitled to an acquittal at the hands of the jury if the return filed by him as a result of his mere negligence or carelessness did not set forth the true and correct income and amount of tax due and owing thereon, was not dispensed with by the general instruction that

in order to convict it is necessary for the jury to find the acts of the defendant to have been done wilfully.

Appellant in his Proposed Instruction No. 30 [Tr. p. 125] requested the trial court to instruct the jury as follows:

“You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, but are unable to determine from the evidence whether or not defendant Phillip Himmelfarb did so in the honest belief that such return was true and correct, or if said defendant was acting under a mistake of fact respecting, or in ignorance of, the truth or falsity thereof, you must find the defendant Phillip Himmelfarb not guilty.”

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 125, 1443-1444].

It is the law that a taxpayer in the preparation and filing of an income tax return under a mistake of fact respecting, or in ignorance of the truth or falsity of the matter therein set forth, is not guilty of a violation of Section 145 (b) of the Internal Revenue Code.

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820;

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

An accused is entitled to a specific instruction that he is entitled to an acquittal if the jury finds that his income tax was prepared or filed under a mistake of fact or in ignorance of the truth or falsity of the matters set forth therein, and the general instruction respecting wilfulness does not dispense with the necessity for giving, upon request, such specific instruction.

Appellant in his Proposed Instruction No. 35 [Tr. p. 126] requested the trial court to instruct the jury as follows:

“You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb believed that any income received by him from a partnership or joint venture was accountable and the tax thereon was payable by him as income for the year 1945, then and in that event it is your duty to find the defendant Phillip Himmelfarb not guilty even though you may believe that he was mistaken as to when or in what year such income was accountable and payable.”

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 126, 1444].

It is the law that a taxpayer in the preparation and filing of an income tax return under a mistake of fact respecting, or in ignorance of the truth or falsity of the

matter therein set forth, is not guilty of a violation of Section 145 (b) of the Internal Revenue Code.

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820;

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

An accused is entitled to a specific instruction that he must be acquitted if the jury finds that his income tax return was prepared or filed under a mistake of fact or in ignorance of the truth or falsity of the matters set forth therein, and the general instruction respecting wilfulness does not dispense with the necessity for giving, upon request, such specific instruction.

The refusal by a court of a proper request for instruction to the jury is reversible error.

U. S. v. Schanerman, 3rd Cir. (1945), 150 F. (2d) 941, 946;

Pinkerton v. U. S., 5th Cir. (1944), 145 F. (2d) 252, 255;

U. S. v. Murdoch (1933), 290 U. S. 389, 396, 78 L. Ed. 381, 54 S. Ct. 223;

Gold v. U. S., 3rd Cir. (1939), 102 F. (2d) 350, 352;

McAdams v. U. S., 8th Cir. (1934), 74 F. (2d) 37, 40;

U. S. v. Byers, 2nd Cir. (1934), 73 F. (2d) 419;

Little v. U. S., 10th Cir. (1934), 73 F. (2d) 861, 867.

It seems settled that where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction which is not in substance or in effect given in the charge to the jury, or is not covered in the general charge of the court, the refusal to give the instruction is reversible error.

U. S. v. Schanerman, 3rd Cir. (1945), 150 F. (2d) 941, 946;

Hersh v. U. S., 9th Cir. (1934), 68 F. (2d) 799, 807;

Hendrey v. U. S., 6th Cir. (1916), 233 Fed. 5, 18;

Calderon v. U. S., 5th Cir. (1922), 279 Fed. 556.

The court having charged the jury that if they find that the appellant wilfully and intentionally attempted to defeat and evade the payment of tax due the United States of America by filing a false and fraudulent return in which he failed to disclose the true and correct amount of income received, the government is entitled to a verdict of guilty, the court, should upon request, have given the charge that if the jury failed to find the essentials of the crime charged defendant should be acquitted—the converse of the charge given, which puts to the jury appellant's side of the case.

Little v. U. S., 10th Cir. (1934), 73 F. (2d) 861.

SPECIFICATION OF ERROR NO. VI.

The Trial Court Erred in Denying Appellant's Motions for an Acquittal Notwithstanding the Verdict of the Jury, and in the Alternative, for a New Trial.

After the verdict of the jury finding appellant guilty of the offense charged against him in Count II of the indictment, appellant moved the court for judgment of acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial, as to said Count II [Tr. pp. 134-135]. These motions the court denied [Tr. p. 1608].

The foregoing motions were based upon the following grounds, to wit:

(1) The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence on the part of the prosecution;

(2) The court erred in denying defendant's motion for acquittal made at the conclusion of all the evidence;

(3) The verdict is contrary to the weight of the evidence;

(4) The verdict is not supported by substantial evidence; and

(5) That counsel for the government was guilty of misconduct in addressing improper argument to the jury.

All of the grounds comprising the basis for these motions have heretofore been separately considered and discussed herein. It amply appears therefrom that the motions for acquittal notwithstanding the verdict of the jury, or in the alternative, for a new trial, were well taken and should have been granted.

Appellant respectfully submits that this court must, after a consideration of the record against appellant in this case, conclude as was concluded by the court in *Strickland v. U. S.*, 5th Cir. (1946), 155 F. (2d) 167:

“When the facts of this case are carefully considered and weighed, it becomes patent that they do not measure to the guilt of defendant.”

Respectfully submitted,

WILLIAM KATZ,

Attorney for Appellant.

No. 11666

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

MAR 31 1948

PAUL P. O'BRIEN,

CLERK

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No. 11666

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

This is an appeal from the District Court of the United States in and for the Southern District of California, Central Division, on a conviction of the appellant and a judgment of the Court thereon, under Count I of a four-count indictment. Count I charges appellant with attempting to defeat and evade a large part of the income tax due and owing from him to the United States of America for the calendar year 1944.

Jurisdiction.

The appellant and one PHILLIP HIMMELFARB were jointly indicted on January 22, 1947, by the Grand Jury of the United States District Court in and for the Southern District of California, Central Division, and charged with four counts under Section 145(b) I. R. C.; 26 U. S. C. 145(b). The first count charges that on or about the

15th day of March, 1945, in the Southern District of California and within the jurisdiction of said Court, defendants did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by SAM ORMONT to the United States of America for the calendar year 1944; (1) "by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income *and victory tax* return wherein they stated that his net income for said calendar year was the sum of \$12,174.57", and the tax thereon \$3,626.58, whereas it was alleged his net income for said calendar year was \$36,982.52 for income tax purposes, and that the income tax thereon was \$18,143.12; and (2) "by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year *and* the sources thereof" [R. Vol. I, pp. 2-3].

Count II was in practically the same language as Count I, except that it charged the defendants with making and filing a false return for 1944 of the income of defendant PHILLIP HIMMELFARB [R. Vol. I, pp. 3-4].

Count III was a similar charge against SAM ORMONT only for income tax for the year 1943 [R. Vol. I, pp. 4-5].

Count IV was a similar charge against SAM ORMONT only for alleged income for the year 1942 [R. Vol. I, pp. 5-6].

Jurisdiction of said District Court was based upon Title 28, Section 41(2), U. S. C. A. (Judicial Code, Section 24) and Section 145(b) I. R. C.; 26 U. S. C. 145(b).

The jury returned the verdict of guilty on Count I as to appellant, and judgment was entered June 16, 1947 [R. Vol. I, p. 139]. Notice of appeal to this Court was filed June 24, 1947 [R. Vol. I, p. 207].

This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U. S. C. A. 225).

Statement of Case, Presenting the Questions Involved and the Manner in Which They Are Raised.

1. MOTION TO DISMISS INDICTMENT.

On the 3rd day of February, 1947, the appellant duly filed a motion to dismiss said indictment and each separate count thereof [R. Vol. I, pp. 24-41], specifying as to Count I that the same does not state facts sufficient to constitute a crime or offense on the part of said defendant SAM ORMONT, and further specifically pointing out twenty separate grounds, wherein said Count I was insufficient, summarizing as follows: that it was *not alleged that any part* of the alleged income for 1944 *remained unpaid* or was unpaid at the time the indictment was rendered, nor what sums had been paid, nor what portion, if any was unpaid; that it did not appear how defendant SAM ORMONT could defeat his income tax by filing a "fraudulent victory tax return" (there being no such tax); that it did not show the "gross income" of the defendant SAM ORMONT for said year; that it did not show the basis for the Government's figure of \$36,982.52 alleged to be net income, nor what portion of the alleged \$18,143.12 tax was "victory tax", what portion was "normal tax", and what portion was "surtax"; that it did not appear who were the proper officers of the United States from whom defendants attempted to conceal the income of defendant SAM

ORMONT, nor how this defendant concealed the "sources" of income, nor how the concealment of "the sources" violated Section 145(b) I. R. C. or constituted attempted evasion of income tax; that two offenses were set forth in said Count I and not separately stated, in that a felony of attempting to defeat and evade income tax, under subdivision (b) of Section 145, *supra*, was joined with a misdemeanor, namely, concealing sources of income, under subdivision (a) of Section 145, *supra*.

Similar specifications were made as to each of the Counts II, III and IV.

2. MOTION FOR BILL OF PARTICULARS.

At the time of filing the motion to dismiss, this defendant SAM ORMONT also filed a motion for a bill of particulars [R. Vol. I, pp. 57-71], and demanded facts and figures showing (a) the basis of the figure \$36,982.52 alleged in Count I as net income, and an itemization of the items used by plaintiff in determining defendant SAM ORMONT's net income to be said sum, and an itemization of the sources from which such figures were derived, what part thereof constituted net income for "normal tax", what part was "surtax net income", and what part was "victory tax net income"; (b) the "gross income"; (c) the manner of calculating all of said taxes and the basis for the alleged income tax of \$18,143.12 under Count I, showing all credits and deductions allowed in such calculations; (d) a statement of dates and amounts of payments made by the defendant SAM ORMONT on account of his income tax for that year; and (e) a statement of the portion, *if any*, of the \$18,143.52 *which was unpaid*.

Similar particulars were demanded as to Counts II, III and IV of the indictment.

March 12, 1947, Judge Wm. C. Mathes of said District Court made an order denying said motion to dismiss, and denying practically all of said motion for a bill of particulars [R. Vol. I, pp. 74-76]. These rulings are assigned as errors No. 1 and No. 2 on the appeal [R. Vol. IV, pp. 1636-1637].

3. MOTION FOR CONTINUANCE AND BILL OF PARTICULARS.

Thereafter the defendant SAM ORMONT entered a plea of not guilty to each and every count, and the case was called for trial on May 21, 1947, at 10 o'clock A. M., before the Honorable Peirson M. Hall, District Judge, at which time this appellant's counsel objected to the case proceeding, on the ground that neither the indictment nor the bill of particulars which was furnished disclosed the *basis* of the figures or items which the Government claimed were omitted from the income and not accounted for, nor from whence such items were derived, and that the defendant SAM ORMONT could not prepare for a defense without knowing those items and would necessarily be taken by surprise, and asked for a continuance of the trial until such information was furnished [R. Vol. I, pp. 238-239]; and said motion was on the further ground that the indictment, together with the bill of particulars, did not state a public offense [R. Vol. I, pp. 241-242]. The Court denied the motions on the ground that they had been passed on by another judge and had become the law of the case [R. Vol. I, p. 239].

4. ONCE IN JEOPARDY.

A jury of twelve and one alternate were duly impaneled and sworn [R. Vol. I, p. 242]. Thereupon and on May 22, 1947, at 10 o'clock A. M., MR. WILLIAM KATZ, attorney for defendant PHILLIP HIMMELFARB only, specifically and in behalf of said defendant only made a motion to withdraw a juror and declare a mistrial, based upon the fact that during the impanelment of the jury MR. STRONG, Deputy United States Attorney, had referred to another case as pending against the defendants. Without the consent of this appellant or his counsel, the Court granted said motion and discharged the jury [R. Vol. I, p. 260]. Thereupon appellant's counsel made a motion to dismiss the indictment and permit him to enter a plea "once in jeopardy", based upon the record in this case showing the impanelment, swearing of the jury and discharge thereof *without his consent*. The motion was denied [R. Vol. I, pp. 302-304]. Thereupon appellant's counsel made a motion for immunity from prosecution on the ground that appellant had been subpoenaed and compelled to testify before the Grand Jury in connection with matters which necessarily would be involved in this indictment, including questions of invoices, profits and the like, without being advised of his constitutional rights [R. Vol. I, pp. 306-307]. Thereupon appellant's counsel made a motion to suppress all evidence pertaining to matters regarding meat, prices of meat, sales of meat, invoices and the like, which motion was likewise denied [R. Vol. I, pp. 310-311].

A second jury was thereupon duly impaneled and sworn [R. Vol. I, p. 312]. When the first witness was sworn for the Government and Government's Exhibits Nos. 1,

2, 3, 4, 5 and 6 were marked for identification and offered in evidence, appellant's counsel *objected to the introduction of any evidence* on the ground that the indictment, coupled with the bill of particulars, did not sufficiently allege a public offense, incorporating as grounds thus set forth in the original motion to dismiss and in the original motion for a bill of particulars, and specifically objected to the introduction of said exhibits, and particularly Exhibit No. 3, being a copy of the income return of appellant for 1944, on the ground of *variance* between said exhibit and the charge in Count I of the indictment, in that the charge in the indictment as to the *manner* in which the alleged crime was committed alleged the making and filing of an "income and victory tax return", whereas Exhibit No. 3 was simply an income return and not an income and victory tax return. The objection was overruled [R. Vol. I, pp. 320-330].

The Government accountant J. BRYANT EUSTICE was sworn. Appellant's counsel interposed a running objection to all evidence by this witness [R. Vol. II, p. 550]. All objections and motions in this statement referred to will be specifically set forth in the specifications of error relied upon. This witness, over repeated objections, was permitted to testify from certain compilations that had been made partly by him and partly by others, regarding books and records and documents *which were not in evidence and were never produced in Court*; from certain bank records, checks and the like; and from a purported list of bonds prepared by another party, without the original bonds or any original evidence being produced, and was allowed to give his assumptions, conjectures and opinions therefrom as to alleged income of appellant which the witness *arbitrarily* labeled as "unexplained" and un-

reported income [R. Vol. IV, p. 1370], covering the years 1942, 1943 and 1944, and in so doing used the said list of bonds which he admitted showed on its face that the most of them were in two names and not merely in the name of appellant. Yet he charged all said bonds to the appellant, as to any that he, the witness, could not specifically trace the funds that purchased them, he calculated them as unreported income and by this means arbitrarily testified that appellant had such unreported income [R. Vol. II, pp. 507-551]. Government's Exhibit No. 6 was a joint venture information return by the defendants showing a gross revenue from joint venture for the fiscal year period beginning May 1, 1944, and ending April 30, 1945, in the sum of \$71,388.84, with no deductions and showing an equal division thereof between the two defendants for said fiscal year [R. Vol. II, p. 853]. As to the alleged unreported income for 1944, this witness arbitrarily took from said Exhibit No. 6 \$19,257.76 and charged the same against appellant as unreported 1944 income [R. Vol. II, p. 860]. The witness further charged as unreported 1944 income \$3,000.00, which he failed to trace, and the sum of \$1,000.00 embraced in the payment by appellant of a \$4,000.00 loan, which \$1,000.00 the witness said he could not trace. Then, there were some other small items making up the sum of \$23,989.26 which the witness said was unreported income for 1944 [R. Vol. II, pp. 547, 548, 860]. As witness EUSTICE, on cross-examination, testified that he got the information concerning the bonds from Mr. PHOEBUS, appellant's counsel immediately moved to strike all of his testimony with respect to the bonds on the ground that it was hearsay [R. Vol. II, p. 549]. Witness EUSTICE used the same method of accounting in all three of the years [R. Vol.

II, p. 549]. The Court held that the case *was built up on an arbitrary accounting method* used by such witness [R. Vol. IV, p. 1370]. No other witness for the Government made any pretense of testifying as to appellant's income for 1944 that was alleged to be unreported, except Government witness ERNEST LINK, who had been the bookkeeper for appellant during many years and who had made out all of the income tax returns for those many years, which included all the years involved in this case, who testified that all of such returns were correct, with the exception that he claimed as to 1944 there had been a change made of approximately \$3,000.00 in the cost of certain cattle [R. Vol. II, pp. 469-471], and he further testified that such \$3,000.00 was actually paid as an additional payment for such cattle [R. Vol. II, pp. 472-473]. No other evidence of the *corpus delicti* was introduced as to the income for 1944 (Count I) nor was any other evidence of the *corpus delicti* introduced for 1942 and 1943, except that witness LINK identified some invoices [Exhibits No. 38 and No. 39], dated in 1942, which he said *he* had never entered on the records.

On June 3, 1947, while Court was in session and the jury present, a U. S. Marshal came into open court and within the view of the jury, served the defendant SAM ORMONT with a subpoena *duces tecum* to produce his books. After adjournment and at the next calling of the court, appellant's counsel immediately called this incident to the attention of the court, moved to quash the subpoena and assigned the acts as misconduct [R. Vol. II, pp. 805-808; Vol. III, p. 890].

Mr. SAMUEL J. PHOEBUS, witness called for the Government, and who was up to the first day of July, 1945, a

Deputy Collector of Internal Revenue [R. Vol. III, p. 1018], over objection "that it is incompetent, irrelevant and immaterial; no proper foundation laid; not shown that the defendant in any discussion, if they had any, was forewarned of what their business was, or of his constitutional rights" [R. Vol. III, p. 1019], was permitted to testify to a conversation with the defendant on May 18, 1945, in which he asked the defendant if he had been required to pay other people amounts which he had not recorded on his books and to which the defendant first said "No", and when questioned further said "Yes" and that the witness said that he admitted that he had made such extra payments and that he then asked the defendant whether or not he had attempted to pass these overpayments over to his own customers and he said "No" he hadn't, that all of his income was recorded on his invoices and on his books and records, and that then the defendant asked "If a packer found himself in a situation where he had bought meat at 'A' prices, and the grader had graded it as 'B', if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they in that event come in and attempt to determine his income on the presumption that all such sales had been made on this basis?" The witness said he told him "No" that that was not the way they arrived at a taxpayer's income, and thereupon the witness suggested or made an appointment with the defendant for the 22nd day of May and suggested that he bring his individual income tax return with him and also prepare in the meantime a statement of his present net worth [R. Vol. III, pp. 1025-1026]. The witness was then asked to relate a conversation with the defendant as of May 23, 1945, to which the same ob-

jection was interposed and the objection was sustained [R. Vol. III, pp. 1027-1028]. Thereupon the witness was asked and over objection testified to a conversation with the defendant, occurring on May 24, 1945, in the Office of the Intelligence Unit on the 8th Floor of the Federal Building in Los Angeles, California. There were present Mr. ORMONT, Mr. BIRCHER, Mr. SCHLICK and the witness. Mr. SCHLICK and the witness were deputy collectors and Mr. BIRCHER was a Special Agent of the Internal Revenue Bureau [R. Vol. III, pp. 1027-1029].

There was then some discussion between the Court and various counsel and particularly as to the sufficiency of the warning, and the Court said:

“The Court: Well, I think probably it is sufficient. *It is awfully thin though.*” (Italics supplied.)

The Court thereupon overruled the objection and denied the motion [R. Vol. III, pp. 1033-1034].

Thereupon plaintiff's counsel stated:

“Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without repeating it.” [R. Vol. III, p. 1034.]

Thereupon the witness was allowed to testify in detail as to said conversation and stated, in substance, that the defendant said that he continued to operate ACME MEAT COMPANY, as sole proprietor, until May 1, 1944, at which time he became associated with Mr. HIMMELFARB, and

that he and Mr. HIMMELFARB had a verbal agreement to share the legitimate profits of the ACME MEAT COMPANY, the first \$24,000.00 would be shared equally, all amounts over of legitimate net profit would go to ORMONT and that they had an agreement to share the collection of overcharges on a fifty-fifty basis, and those operations started May 1, 1944, and were discontinued May 18, 1945, and that for those years their profit had been \$35,000 apiece; that Mr. ORMONT had pulled out of his pocket a little memo pad or book in which was written figures, showing that from May 1, 1944, until January 5, 1945, the amount was roughly \$12,000.00, and from January 6, 1945, until April 30, 1945, the balance was what was remaining of the \$35,000.00; that Mr. BIRCHER copies these figures on a piece of paper taken from said book; that Mr. ORMONT was asked if there was any way they could verify the amounts and he said that there wasn't any way, that no record had been kept except that they would write down the amount that they had accumulated to date and when they had accumulated an additional amount, they would throw away the old piece of paper and retain the current one. He stated that the collections were from customers of ACME MEAT COMPANY, but that this was no basis for verification as the prices fluctuated, there was no uniform charge per pound made for these overcharges and sometimes no charges were made to a customer [R. Vol. III, pp. 1035-1039]. (Thereafter the books with names of all customers were available to Government.) He further testified that the defendant said, in answer to question where the \$35,000.00 went, \$7,000.00 of it went into his bank account and the balance was reinvested in the business. He also said that he had a safety deposit box in which he had approximately \$90,-

000.00 in Government bonds. He was asked about loans from other persons and he said there were \$14,000.00 or \$15,000.00 on the books as loans from DORA GOLDBERG, but that only \$6,500.00 of these loans were legitimate [R. Vol. III, pp. 1045-1046].

On cross-examination, the witness admitted that Mr. ORMONT, at least on the 24th day of May, 1945, being the second conversation, told him he would give them anything they wanted in their investigation or examination and that he subsequently would render the books and records of the ACME MEAT COMPANY open for their investigation; likewise invoices, and they even took some invoices [R. Vol. III, pp. 1070-1071], and he further admitted that Mr. ORMONT told him that this matter of the \$35,000 item was an *entirely side issue from the ACME MEAT COMPANY* and that he and Mr. HIMMELFARB entered into a joint venture and that this \$35,000.00 defendant received was received through the joint venture and that they, Mr. ORMONT and Mr. HIMMELFARB, decided to report their joint venture income on a fiscal year basis and that they had filed Exhibit No. 6 on a fiscal year basis [R. Vol. III, pp. 1074-1075], and that the witness later found that the defendant had made his estimate consistent with his plan to file on a fiscal year basis *and paid all taxes thereon* [R. Vol. III, pp. 1078-1079] (witness EUSTICE admitted that under defendant's said manner of accounting and paying, he overpaid the Government approximately \$3,000.00 more income tax than he would have had to pay under the Government's theory in this case) [R. Vol. II, p. 861].

Witness WILLIAM S. MAILIN was called and sworn in behalf of the plaintiff. He was a certified public ac-

countant employed by Mr. MIRMAN, an attorney who then represented Mr. ORMONT and Mr. HIMMELFARB jointly, and which said attorney employed said accountant to assist him in connection with his legal services to said defendants, and said accountant received all of his directions from said attorney [R. Vol. III, pp. 1093-1102]. He was permitted to testify concerning Government's EXHIBIT 42 and was allowed to testify as to what was listed thereon, over the objections that it was incompetent, irrelevant and immaterial, that the bonds and the contents of the box would be the best evidence, that it was a conclusion of the witness, and was privileged [R. Vol. III, p. 1105].

EXHIBIT 42 was admitted in evidence over the objections that it was incompetent, irrelevant, immaterial, not the best evidence, that no proper foundation was laid, that the bonds would be the best evidence, that the exhibit showed on its face that other people were interested in the bonds, and that there was no evidence that the bonds were Mr. ORMONT's [R. Vol. III, pp. 1105-1106].

The Court permitted the witness to testify, over the objection that they were incompetent, irrelevant, immaterial and were privileged communications, that the witness sent EXHIBITS 51-A and 51-B, to Mr. BIRCHER, a Government agent, and that he believed he saw the signature placed on 51-A, but that he did not have any definite recollection as to the latter [R. Vol. III, pp. 1108-1113].

The Court admitted in evidence EXHIBITS 51-A and 51-B (all dated long after March, 1945), over the objection that there was no proper foundation laid, that they were incompetent, irrelevant and immaterial, that they

were privileged communications, not within the issues, that no *corpus delicti* had been established, that they were subsequent in time to the offense charged in the indictment, and that the witness was the agent of the attorney for Mr. ORMONT [R. Vol. III, pp. 1113-1116].

The witness was likewise allowed to testify that EXHIBIT 51-C *for Identification* was by him mailed to Mr. BIRCHER [R. Vol. III, p. 1117].

The Court admitted in evidence EXHIBIT 51-C, over the objection that it was incompetent, irrelevant, immaterial and privileged [R. Vol. III, p. 1119].

DONALD BIRCHER, special agent of the Bureau of Internal Revenue, was called as a Government witness and permitted to testify concerning one of the conversations to which the witness PHOEBUS had testified over the objection heretofore shown (which conversation was on May 24, 1945, in Room 844, Post Office Building, Los Angeles). The witness testified that he told Mr. ORMONT that he had a right to an attorney and that he was not required to give testimony, and that any statements he made or documents he produced *at that interview* might be used in court against him *in some manner* at some future time; that the defendant asked the witness specifically whether any statements he made might become knowledge available to certain other Government agencies, and was told by Mr. BIRCHER that normally any information given the Internal Revenue Department *would be held in confidence* by that department, but if a criminal trial should follow, such information *might be disclosed at any such trial*. Before making any statement at said conference, the *defendant* specifically asked if anything he might

say would be kept in confidence by those present and would not be divulged to any other department of the Government [R. Vol. III, pp. 1172-1173].

Witness BIRCHER admitted that the defendant did tell them that neither he nor defendant HIMMELFARB ever asked any customer for anything extra, that in many instances customers didn't give them anything extra, and that many of the amounts paid by the customers were paid at a time when such customers were not buying anything from them and on different dates than those on which any purchases had been made [R. Vol. III, pp. 1179-1180], and further told them that these contributions or gifts were a "side venture" of the two defendants and not treated as a part of the ACME MEAT COMPANY business [R. Vol. III, pp. 1185, 1186 and 1188].

The defendant also told the Government agents that in purchasing bonds he had in part used funds that he had accumulated in prior years from savings [R. Vol. III, p. 1191]. Witness EUSTICE admitted he was told the same thing by the defendant, but he gave no credit therefor.

At the close of the Government's evidence, appellant's counsel moved for an acquittal on each and every count of the indictment, on the ground that the *corpus delicti* had not been established and that there was insufficient evidence to warrant a conviction. The evidence was hearsay and incompetent [R. Vol. III, pp. 1252-54]. The motion was granted as to Count II and denied as to Counts I, III and IV [R. Vol. III, p. 1262] (Note: At the close of the entire evidence, the Court reversed his ruling and granted appellant's motion to acquit this appellant as to Counts III and IV, being for the years 1942 and 1943 [R. Vol. IV, p. 1367].)

Thereupon a great number of reputable witnesses testified as to the good character of the appellant [R. Vol. IV, pp. 1333-1347].

Defendant testified as to a great number of the checks introduced in evidence as having been used in the purchase of bonds in 1942 and 1943, and also testified that he had considerable cash that he likewise used, and explained most all of the items charged by expert EUSTICE as unexplained income and showed exactly what funds were used and where they came from [R. Vol. IV, pp. 1297-1329].

At the close of all the evidence, appellant's counsel renewed a motion for acquittal as to Counts I, III and IV, and the Court granted said motion as to Counts III and IV, stating on page 1370 that the whole case as to those counts was built up by an arbitrary accounting method used by the Government agent (1942 and 1943) and denied it as to Count I [R. Vol. IV, p. 1374].

Thereupon counsel for appellant moved to strike all the testimony of witness EUSTICE, with respect to the years 1942 and 1943, which motion was denied [R. Vol. IB, p. 1374]. Thereupon a similar motion was made as to the testimony of witness LINK and was likewise denied [R. Vol. IV, p. 1374].

Thereupon the case was argued and submitted to the jury on Count I only as to appellant and he was found guilty thereon and judgment was accordingly entered, from which this appeal is prosecuted.

Before judgment was pronounced, appellant's counsel made an oral motion for acquittal and a motion for a new trial, notwithstanding the verdict embracing, by reference, all the grounds set forth in the motion to dismiss

the indictment and the grounds embraced in the motion for a bill of particulars and the grounds embraced in the motion for acquittal presented at the end of plaintiff's evidence and the grounds embraced in the motion for acquittal at the close of all evidence and on the ground of error in the Court in denying the motion to strike the testimony of witness EUSTICE as to the years 1942 and 1943, which motions were denied [R. Vol. IV, pp. 1609-1610].

Questions Involved and Raised by This Appeal.

1. Did the Court err in denying appellant's motion to enter a plea of "once in jeopardy"?
2. Did the Court err in denying the written motion to dismiss the indictment?
3. Did the Court err in denying appellant's motion for a bill of particulars?
4. Did the Court err in denying appellant's motion for a continuance at the outset of the trial and for an order requiring plaintiff to supply a further bill of particulars?
5. Did the Court err in denying appellant's motion for immunity at the outset of the trial?
6. Did the Court err in denying appellant's motion to suppress evidence?
7. Did the Court err in overruling appellant's objection to Government's Exhibit No. 3 and admitting the same in evidence?
8. Did the Court err in admitting the evidence of Government accountant J. BRYANT EUSTICE over repeated objections?

9. Did the Court err in denying appellant's motion to strike the testimony of witness EUSTICE pertaining to the bonds?

10. Did the Court err in striking the testimony of Government witness ERNEST LINK over repeated objections?

11. Was it prejudicial misconduct of the Marshal to serve the subpoena on the defendant in open Court in the presence of the jury?

12. Did the Court err in admitting the evidence of Deputy Collector SAMUEL J. PHOEBUS without a proper foundation being laid and over repeated objections?

13. Did the Court err in denying appellant's motion to strike the testimony of witness PHOEBUS?

14. Did the Court err in admitting the testimony of Government witness WILLIAM S. MAILIN over objections?

15. Did the Court err in admitting Government Exhibit No. 42 over objections?

16. Did the Court err in admitting Government Exhibits No. 51-A and No. 51-B over objections?

17. Was there ever competent proof of the *corpus delicti*?

18. Did the Court err in admitting the evidence of Special Agent DONALD BIRCHER over objections?

19. Did the Court err in denying appellant's motion for acquittal as to Counts I, III and IV made at the close of the Government's evidence?

20. Did the Court err in denying appellant's motion for an acquittal on Count I at the close of all evidence?

21. Did the Court err in denying appellant's motion to strike testimony of witness EUSTICE as to the years 1942 and 1943, after having acquitted the defendant as to those years, namely Counts III and IV?

22. Did the Court err in denying the motion of appellant to strike the testimony of witness LINK as to the years 1942 and 1943?

23. Did the Court err in refusing to instruct the jury to acquit the appellant?

24. Did the Court err in refusing to give appellant's requested instruction X-1?

25. Did the Court err in refusing to give appellant's requested instruction X-2?

26. Did the Court err in refusing to give appellant's requested instruction X-3?

27. Did the Court err in refusing to give appellant's requested instruction X-4?

28. Did the Court err in refusing to give appellant's requested instruction X-6?

29. Did the Court err in refusing to give appellant's requested instruction X-8?

30. Did the Court err in refusing to give appellant's requested instruction X-9?

31. Did the Court err in refusing to give appellant's second requested instruction also X-8?

32. Did the Court err in refusing to give appellant's requested instruction X-10?

33. Did the Court err in refusing to give appellant's requested instruction X-12?

34. Did the Court err in refusing to give appellant's requested instruction that all facts proven must not only be consistent with the theory of guilt, but inconsistent with the theory of innocence?

35. Did the Court err in failing to give any of the instructions requested by appellant for which no specific exception was taken?

36. Did the Court err in its charge to the jury?

37. Did the Court give the jury conflicting instructions?

38. Did the Court err in failing to instruct the jury on the Court's own motion to its right to find the defendant guilty of lesser offenses embraced within the charge in Count I?

39. Was it not the duty of the Court on its own motion to instruct the jury that they might find the defendant guilty under Count I of a misdemeanor under (a) of Section 145 I. R. C.?

40. Did the Court err in instructing the jury that there was no variance between Government's Exhibit No. 3 and Count I of the indictment and that they could disregard a portion of the allegations of said Count?

41. Did the Court err in instructing the jury that a taxpayer is required to pay his income taxes on all funds "earned" in the year in which the same was earned?

42. Did the Court err in submitting questions of law for the jury to determine?

43. Was it a question of law for the Court to determine as to the sufficiency of books or records to entitle a taxpayer to file a fiscal year return?

44. Did the Court err in instructing the jury that a taxpayer must keep both books and records?

45. Was the prosecuting attorney guilty of misconduct in his argument to the jury?

46. Did the Court err in denying appellant's motion for an acquittal, notwithstanding the verdict?

47. Did the Court err in denying appellant's motion for a new trial?

Specification by Number of Assigned Errors Relied Upon.

SPECIFICATION OF ERROR NO. 1.

The trial court erred in denying appellant's written motion to dismiss the indictment, filed February 3, 1947, based upon the ground that Count I did not state a public offense; did not show any tax was due or unpaid; did not show what portion, if any, was unpaid; did not show the gross income; did not show how the filing of a victory tax return could defeat or evade the tax for 1944; did not show the basis for the alleged income claimed by the plaintiff nor what portion of the alleged income tax was victory tax, what portion was normal tax, what portion was surtax; nor who were "proper officers of the United States" from whom it was alleged information was concealed nor how defendant could be guilty of any offense by concealing or attempting to conceal "the sources" of income; that two separate offenses were set forth and not separately stated, a felony for attempting to defeat or evade under (b) of Section 145, I. R. C. joined with a misdemeanor under (a) of Section 145, I. R. C. [R. Vol. I, pp. 24-41, 74-76; Vol. IV, pp. 1627, 1637].

SPECIFICATION OF ERROR NO. 2.

The Court erred in not granting the motion of appellant for a bill of particulars, which motion was filed February 3, 1947, and denied March 12, 1947, and demanded a bill of particulars as to the facts and figures showing the basis of the \$36,982.52 alleged as net income and an itemization of the items, sums and figures used by plaintiff in determining said net income for the calendar year 1944 and a statement of the funds from which derived and the several amounts and various items forming the same and what portion of said sum was the income from the calculation of the normal tax, what portion for surtax and what portion for victory tax; facts and figures showing the basis, figures, credits and deductions in determining the alleged tax of \$18,143.12, and showing what portion thereof was normal tax, what portion was surtax, what portion was victory tax and showing the dates and amounts of credits for payments on account thereof [R. Vol. I, pp. 57-60, 74-76; Vol. IV, pp. 1627, 1637].

SPECIFICATION OF ERROR NO. 3.

The Court erred in denying appellant's motion for a continuance and for a further bill of particulars on May 21, 1947, based upon the grounds enumerated in the original motion for a bill of particulars and upon the ground that neither the indictment nor the bill of particulars which had been furnished disclosed the basis of the figures or items which the Government claims were omitted from the income, nor from whence they were obtained, and the defendant by reason thereof was unable to proceed and prepare for defense and was therefore not ready for trial and would be taken by surprise until such bill of particulars was supplied [R. Vol. I, pp. 238, 239, 240, 242].

SPECIFICATION OF ERROR No. 4.

The Court erred in denying appellant's motion to dismiss and enter a plea of "once in jeopardy" made May 23, 1947, on the record before the Court in this case, showing that a jury had been duly impaneled and sworn to try the defendant and then had been dismissed without his consent [R. Vol. I, pp. 302, 303; Vol. IV, pp. 1627, 1638].

SPECIFICATION OF ERROR No. 5.

The Court erred in denying appellant's motion for immunity and for a dismissal on the ground that appellant was subpoenaed and required to testify before the Grand Jury without being advised of his constitutional rights on matters involved in charges set forth in the indictment in this case [R. Vol. I, pp. 305-307; Vol. IV, pp. 1627, 1638].

SPECIFICATION OF ERROR No. 6.

The Court erred in denying appellant's motion to suppress all evidence and grant defendant immunity based upon the ground that he had been subpoenaed and required to testify before the Grand Jury, without being first advised of his constitutional rights, on matters embraced within the charge in this case [R. Vol. I, pp. 310, 311; Vol. IV, pp. 1627, 1638-1639; Vol. I, pp. 141-146].

SPECIFICATION OF ERROR No. 7.

The Court erred in overruling appellant's objections and admitting Government Exhibits Nos. 1, 2, 3 and 4, which objections were as follows:

"Mr. Robnett: * * *

Now, your Honor, take up the offered exhibits. They are in for identification with numbers.

The Court: 1, 2, 3, 4, 5.

Mr. Robnett: Yes. Taking up No. 1, which appears to be an individual income tax return for 1942, for the calendar year, by Sam Ormont, I wish to object to the introduction of that as not being within the issues in the indictment and the plea of the defendant of not guilty, for the reason that the count it would be under—

The Court: Count 4.

Mr. Robnett: I will have no such objection, I see, as to that one.

My objections rather will be to exhibit for identification No. 3, which is the individual income tax return for the calendar year 1944 by Sam Ormont. I object to that on the ground that under the only count in the indictment, No. 1, that that would be applicable, if at all—it is not admissible because it is not within the charge in that count for this reason: This return, if your Honor will examine it, is a simple return of ordinary taxes and no Victory tax whatever, yet the charge in the indictment of what this defendant did was that he filed a false and fraudulent income and Victory tax."

[R. Vol. I, pp. 335-336; Court's Ruling, p. 339; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 8.

The Court erred in overruling appellant's objection to the introduction in evidence of Government Exhibits Nos. 38 and 39, or the introduction of any testimony in connection therewith by witness ERNEST LINK, which objection was as follows:

"Q. (By Mr. Strong): Now may I show you a group of invoices which are marked Government's

Exhibit 38 for identification and ask you if you ever saw those before.

Mr. Robnett: If the court please, in connection with these invoices I wish to make an objection that they are incompetent, irrelevant and immaterial, and should not be shown to the witness or any testimony admitted thereon. I have a matter that I would like to present to your Honor."

Thereupon the Court said:

"The Court: Do you have other exhibits of this nature which you wish to have marked for identification with this witness?

Mr. Strong: Just one more.

The Court: In other words, if you can get all the exhibits you are going to use in with this witness, maybe we can wrap all the objections up at one time.

Mr. Strong: Very well.

The Clerk: No. 39.

(The document referred to was marked Government's Exhibit No. 39 for identification.)"

Exhibits 38 and 39 are 1942 invoices of ACME MEAT COMPANY [R. Vol. I, pp. 398, 399, 416; Vol. IV, p. 1627].

SPECIFICATION OF ERROR No. 9.

The Court erred in overruling the objection to the question and overruling the motion to strike the answer of the witness ERNEST LINK, pertaining to invoices and list as follows:

"Q. (By Mr. Strong): Did you see Mr. Himelfarb performing any work on the premises of the Acme Meat Company during 1944? A. Yes.

Q. And during 1945? A. Yes.

Q. What did you observe?

Mr. Katz: I object to that, if the Court please, as too indefinite; no foundation laid.

The Court: Overruled.

A. I saw Mr. Himmelfarb making out invoices to customers when they would come to the Acme Meat Company. He would then compute on the machine in the office the amount due by the customer; then he would make after that computation another computation on the machine, a multiplication of the weight of that carcass of beef, or whatever it may have been, and enter this figure which was, as a rule, a computation—

* * * * *

“The Witness: I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk? A. Of the desk of the Acme Meat Company, in the office.

Mr. Robnett: I move to strike out the answer as to Mr. Ormont upon the ground that it is hearsay and the opinion of the witness, and is not binding upon Sam Ormont.

* * * * *

Mr. Robnett: It is incompetent, irrelevant and immaterial.” [R. Vol. I, pp. 429, 430; Vol. IV, p. 1627.]

SPECIFICATION OF ERROR NO. 10.

The Court erred in overruling the following objection to the following question asked of the witness:

“Q. Did you ever see Mr. Himmelfarb receive any sums of money in connection with the sale of meat, which he entered on those sheets you have described?

Mr. Katz: I object to that, as a conclusion of the witness; incompetent, irrelevant and immaterial; no foundation laid.

Mr. Robnett: It is incompetent, irrelevant and immaterial as to Mr. Ormont. There is no connection between Mr. Ormont and Mr. Himmelfarb shown here except as an employee."

See stipulation and objections by one defendant shall apply to both defendants [R. Vol. I, pp. 240-241].

The substance of the witness' testimony was that he saw the list of names of customers, amounts placed opposite those names, sometimes written in the handwriting of Mr. HIMMELFARB, sometimes in the handwriting of Mr. ORMONT; some were marked "paid" and crossed out, some left open and not crossed out [R. Vol. I, p. 434; Vol. IV, p. 1627].

SPECIFICATION OF ERROR No. 11.

The Court erred in overruling the objection to the following question:

"Q. Did you record any of those amounts on those sheets into the records and books of the Acme Meat Company?

Mr. Katz: Objected to as to the defendant Himmelfarb. It is incompetent, irrelevant and immaterial. The books and records are the best evidence.

Mr. Strong: We don't have them.

"Mr. Robnett: We join in the objection."

The witness testified he did not record any of the amounts from said list on the books of the ACME MEAT COMPANY [R. Vol. I, p. 435; Vol. IV, p. 1627].

SPECIFICATION OF ERROR NO. 12.

The Court erred in overruling the objection to the following question:

“Q. (By Mr. Strong): Mr. Witness, will you state from your knowledge of the books and records of the Acme Meat Company how the profits were distributed for the year 1944?”

Mr. Robnett: That is objected to as incompetent, irrelevant and immaterial, and his conclusion, and assuming something not in evidence, namely, that there were profits.

Mr. Katz: I will add to that, if the Court please, that the books and records are the best evidence.”

The witness stated that to the best of his knowledge he credited the entire profits to the account of SAM ORMONT for the entire year of 1944 [R. Vol. I, pp. 435, 436; Vol. IV, p. 1627].

SPECIFICATION OF ERROR NO. 13.

The Court erred in overruling the following objections to the following question regarding a conversation between the witness and Mr. Ormont:

“Q. (By Mr. Strong): Will you state when this happened and who was present? A. It happened at the office of the Acme Meat Company in 19—I don’t really recollect whether it was at the end or in the beginning of 1945.

* * * * *

Q. Will you state what Mr. Ormont said to you?

* * * * *

Mr. Robnett: I am going to object to it for Mr. Ormont on the ground it is after 1944 and is there-

fore incompetent, irrelevant and immaterial, doesn't go to prove any income for 1944 by either defendant."

The witness answered as follows:

"The Witness: Mr. Ormont told me that it was impossible to carry Mr. Phillip Himnelfarb on the books of the Acme Meat Company as a partner although he was a partner because that would spoil some of the subsidy payments and therefore I should list him as an employee, and that the profit was to be distributed to both accounts at certain periods."

[R. Vol. I, p. 439; Vol. IV, p. 1627.]

SPECIFICATION OF ERROR No. 14.

The prosecuting attorney was guilty of misconduct during the examination of witness ERNEST LINK, in repeatedly eliciting from said witness prejudicial statements, after motions to strike had been made and granted, which statements were to the effect that appellant was doing a shady business and for that reason the witness did not want to continue to work for him; and the Court was guilty of misconduct in failing to promptly grant the motions to strike and in failing to instruct the prosecuting attorney to desist from further pursuing said questions and discussion between the Court and prosecuting attorney [R. Vol. I, pp. 441-446].

SPECIFICATION OF ERROR No. 15.

The prosecuting attorney was guilty of misconduct in the redirect examination of Government witness ERNEST LINK, wherein the witness had made an explanation of certain checks in payment of differences on the purchase of cattle and changes which the witness had made on the records and which the defendant had made on

the original bills, so as to avoid the loss of the subsidy payments, and motion was immediately made to strike the answer and thereupon the following transpired:

“Mr. Strong: It proves that the records are false.

The Court: Government counsel’s statement to the jury will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel.” [R. Vol. II, p. 504.]

SPECIFICATION OF ERROR No. 16.

The Court erred in denying the motion to strike the answer of the witness J. BRYANT EUSTICE as to his examination of books and records of the ACME MEAT COMPANY in making his investigation, as follows:

“Q. (By Mr. Strong): In addition to the exhibits that you have examined, did you in connection with your investigation into the income tax return of the defendant Sam Ormont for the years 1942, 1943 and 1944, and the defendant Phillip Himmelfarb for the year 1944, examine any other books or records? A. I examined the books and records of the Acme Meat Company.

“Mr. Katz: I object to that, if the Court please, and move to strike it, in so far as the defendant Himmelfarb is concerned, as there is no foundation laid for the testimony with respect to the examination of the books of the Acme Meat Company.” [R. Vol. II, pp. 517, 518; Vol. IV, p. 1627.]

The witness testified that he examined the books of the ACME MEAT COMPANY for the years ’42, ’43 and ’44; did not examine their records and check books and deposit slips, didn’t consider that necessary, examined cancelled

checks, withdrawals, as recorded on books and records of the capital account and two personal accounts of ORMONT; also loans shown on books; made a transcript of *certain accounts* from records which constitutes part of his work sheet, that these work papers are in connection with the examination of the books of the ACME MEAT COMPANY and other information and that it was necessary for the witness to refer to them to refresh his memory in order to give testimony. His said working papers, as to defendant ORMONT, were marked Government's Exhibit 40 for identification. All this witness' testimony was based upon his said work papers which, in turn, were so based upon hearsay, evidence, books *which were not in evidence nor in Court*, and other extraneous matter.

SPECIFICATION OF ERROR No. 17.

The Court erred in denying defendant's motion to strike the testimony of Government's witness J. BRYANT EUSTICE, as to his conclusion of unreported income of appellant for 1942, which motion was as follows:

"Mr. Robnett: If the Court please, I move to strike out all the testimony the witness has given in this connection upon the ground that it is partially based upon hearsay, but most of it is a mere assumption and conclusion of the witness. He has used, for instance, one item he testified to which showed that there was a \$10,000 repayment of a loan he previously made. That is not income. Your Honor, of course, knows that in many of the items he has testified to here, he said they were unexplained, so far as he was concerned, and it is purely a conclusion of the witness, and is not the kind of evidence to introduce before a jury to try to convict a man for evading income tax.

“Mr. Robnett: Other than that, there is no foundation.

* * * * *

“Mr. Robnett: No proper foundation has been laid for any of it by this witness. Further than that, there is no showing that as to all of these things where he was getting his information from, and he is testifying here today concerning opinions. They may have been opinions, as he admitted as to the bonds, obtained from someone else. It is hearsay. There is not anything authentic about them. I never heard him testify he made all of that report.

* * * * *

“Mr. Robnett: I don’t believe they have laid any foundation that this report he has before him was made by him from things he did examine.” [R. Vol. II, pp. 531, 532; Vol. IV, p. 1627.]

The Court admitted that evidence from books which were not in evidence, nor in court, was “the rankest kind of hearsay” [R. Vol. II, p. 600], yet he permitted it throughout the case.

31 Corpus Juris, Sec. 940;

Hall v. Aetna Life Ins., 85 F. (2d) 447;

Miles v. Arena Co., 23 Cal. App. (2d) 680, at 685.

SPECIFICATION OF ERROR NO. 18.

The Court erred in denying appellant’s motion to strike testimony of witness EUSTICE as to bonds, the witness having testified that in 1943 defendant purchased U. S. Government bonds of \$51,475.00, and then stated:

“Of these bonds he purchased by checks drawn on his personal bank accounts \$32,390.24, and by

checks drawn on his business bank account, that is, Acme Meat Company, \$5000.

“It was the total of those two items, that is, from known sources, \$37,390.24. The difference between that and the actual bonds purchased was \$14,084.76, which could not be traced to any known sources and was not explained by the taxpayer where the source of the funds came from.

* * * * *

“The Witness: The undisclosed income, \$14,084.76. There were a couple of more items.

* * * * *

The Court: Those bonds, the same situation is true there, you don't know whether he bought them or didn't buy them? You are taking some other agent's assumption in that?

The Witness: That is correct.

Mr. Robnett: May I move to strike that out, if the Court please, that whole testimony as to \$14,000, on the ground it is hearsay.” [R. Vol. II, pp. 539-540; Vol. IV, p. 1627.]

SPECIFICATION OF ERROR No. 19.

The Court erred in overruling the following objection to the following question asked of witness J. BRYANT EUSTICE:

“Q. Now taking the year 1944, the income tax return of the defendant Sam Ormont for the calendar year 1944, what was the amount of dividends and interest reported by the taxpayer?

“Mr. Robnett: I object to this, if the Court please, and any evidence in connection with it, on the ground it is incompetent, irrelevant and immaterial, not within the issues of this case. This is not the

return that is alleged in the indictment, and it is at variance from the charges in the indictment. This is the one where your Honor will remember on the question that they have alleged that there was an income and victory tax return made and they have offered or proven no such return.” [R. Vol. II, p. 543; Vol. IV, p. 1627.]

See objections under Error No. 14.

RUNNING OBJECTION.

The following also transpired:

“Mr. Robnett: May it be understood that my objection runs to all of this testimony pertaining to this?

The Court: Yes. That is right. It will be overruled without prejudice to a motion to renew a motion to strike. [R. Vol. II, p. 550.]

The witness testified that Mr. ORMONT's return for 1944 was correct as to the item of dividends and interest, with the exception of \$1.27. As to item 5, Income from Business, the witness said he had additional income of \$817.42 to add, being an item of business expense deducted by taxpayer (this was interest paid to DORA GOLDBERG accounting for and income tax paid thereon by her. Exhibit FF) [R. Vol. IV, p. 1295]. That there was income not disclosed by the taxpayer, \$23,989.26, \$3,000 of which the witness said was funds he could not trace in the purchase of \$5,750 in Government bonds in 1944, \$1,000 unexplained and which witness charged as unreported income of an amount paid on a loan of \$4,000; that the same method of accounting was used in 1944 that the witness used in his accounting of 1942 and 1943; that as to the bonds he got all of his information from

a schedule supplied by Mr. PHOEBUS; that the corrected amount of income as claimed by the witness for 1944 was \$36,982.52 or \$24,807.95 more than was reported and that the tax which the witness claimed should have been paid was \$14,516.54, as against \$3,626.58. The witness then testified concerning Government's Exhibit 42 (list of bonds), said that where he got his information as to the bonds was furnished by Mr. PHOEBUS [R. Vol. II, pp. 545-551]. \$19,257.76 of such assumed unreported income the witness *arbitrarily* took from defendant's *fiscal* year Joint Venture return [R. Vol. II, pp. 860, 868].

SPECIFICATION OF ERROR NO. 20.

The Court erred in failing to grant appellant's motion to strike all the evidence of the witness pertaining to bonds and to sustain the running objection to all testimony pertaining to the income of 1944. After the witness had testified concerning \$3,000.00 which he claimed as unreported income which was paid for bonds and he could not discover the sources of such \$3,000.00 as to 1944 income—

“Q. (By Mr. Strong): As to the bonds, where did you get the information? A. As to the bonds that the taxpayer had in his possession?

Q. Yes. A. From the schedule supplied by Mr. Phoebus, that he had made up, or, I think in connection with another accountant, of the taxpayer.

Q. I could not hear you, Mr. Eustice. A. The schedule of the bonds was given to me by Mr. Phoebus.

* * * * *

Mr. Robnett: I move to strike all the evidence as to the bonds upon the grounds that it is hearsay from the witness.

Mr. Strong: We will connect it up.

The Court: The ruling on that will be reserved.

Q. (By Mr. Strong): What was the total amount of net income for income tax purposes that was reported by the defendant Sam Ormont in his income tax return for the current year 1944?

Mr. Robnett: May it be understood that my objection runs to all of this testimony pertaining to this?

The Court: Yes. That is right. It will be overruled without prejudice to a motion to renew a motion to strike." [R. Vol. II, pp. 549-550; Vol. IV, p. 1627.]

SPECIFICATION OF ERROR No. 21.

The Court erred in denying defendant's motion to strike the following answer of witness EUSTICE relative to the bonds in the joint name of Mr. ORMONT and Mrs. GOLDBERG, which he charged to Mr. ORMONT's income for 1944:

"Q. Which ones did you credit? A. Only amounts which were paid for from funds from unexplained sources.

Mr. Robnett: I move to strike the answer out, if the court please, as calling for a conclusion of the witness, as to which bonds they were and the way he identifies them as to how they were paid. There is no identification of the bonds at all. It is his conclusion as to whether they were paid for or how." [R. Vol. III, pp. 971-972; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 22.

The Court erred in overruling defendant's objection hereinafter set out to the question hereinafter set out, respecting Exhibit Y:

"Q. And in your examination of the records of the Acme Meat Company, were those checks shown as being used to pay for bonds?

"Mr. Robnett: I object to that, if the court please, as asking for an opinion of the witness and hearsay testimony as to what the books show, and the books are the best evidence as to what they show."

The witness answered: "No sir, they do not." [R. Vol. III, pp. 974-975; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 23.

The Court erred in overruling the following objection to the following question pertaining to Exhibit X and in the following rulings to the following questions:

"Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?

Mr. Robnett: I object to that on the ground that the books would be the best evidence, and it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and nothing to show that it even went to the Acme Meat Company or that they had anything to do with it.

The Court: Let me see the exhibit.

(The document referred to was passed to the court.)

The Court: Your question is what?

The question referred to was read by the reporter, as follows:

‘Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?’)

The Court: The objection is not timely, counsel. You cross-examined the witness at length upon the records, books, documents and data of the Acme Meat Company and counsel now by that examination I think you have waived any right to the objection which you have made. The objection is overruled.

The Witness: The answer is no.

Q. (By Mr. Strong): Now showing you defendant’s Exhibit V, which is a check dated January 8, 1943, in the sum of \$5000, paid to the order of Sam Ormont, signed Sam Ormont—it is an Acme Meat Company check—do you know whether this check was used to pay for any of the bonds purchased by the defendant Sam Ormont? A. I do not know that it was; no sir.

Q. And again as to the books and records of the Acme Meat Company which you examined, did they show what that check was used for? A. No, sir. It just indicates that it was money drawn by S. Ormont.

Q. And showing you this document, which is Defendant’s Exhibit O, a check dated 5/11/1942, issued by the Acme Meat Company for \$206.11, signed by Sam Ormont, paid to Sam Ormont, do you know whether this check was used to pay for any bonds purchased by the defendant Sam Ormont during or at about that period? A. No, sir; I do not.

Q. As to the books of the Acme Meat Company, do they show that it was used in that way? A. No, sir.

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial.

The Court: As to his examination of them, you mean?

Mr. Strong: As to his examination of them.

Mr. Robnett: It is a conclusion of the witness and the books would be the best evidence. I never asked him, only from his notes as to what his notes showed as to certain things, your Honor. I don't believe it is proper for him to ask what the books show.

The Court: Counsel amended his question to say what his examination of the books showed.

Mr. Strong: That is what I meant all the time.

The Court: That is what you meant all the time?

Mr. Strong: Yes.

The Court: Whether or not he found them?

Mr. Strong: Yes, he of his own knowledge.

The Court: The objection is overruled.

Q. (By Mr. Strong): Do we have an answer?

A. No, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Strong): Now I show you Government's Exhibit S, which is a check of the Acme Meat Company dated 4/26, 1943, in the sum of \$1332.27, payable to the order of S. Ormont, signed Acme Meat Company by Sam Ormont, and I ask you whether of your own knowledge you know whether this check was used to purchase any bonds by Sam Ormont or in the name of Sam Ormont. A. No, sir; I do not.

Mr. Robnett: Same objection.

The Court: Same ruling.

Q. (By Mr. Strong): Here is another check, Defendant's Exhibit AA, paid to Sam Ormont, \$100, dated 1/22/43, signed Acme Meat Company, by Sam Ormont; and attached to it is a check dated 1/29/43, \$100, paid to S. Ormont, signed Acme Meat Company by Sam Ormont. Do you know whether or not those checks were used to purchase any bonds in the name of Sam Ormont? A. No, sir; I do not know.

Q. And so far as your knowledge of the books and records of the Acme Meat Company, do they show that that was used for that purpose? A. No, sir; they do not." [R. Vol. III, pp. 975-978; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 24.

The Court erred in overruling the following objection to the testimony of witness SAMUEL J. PHOEBUS, occurring on May 18, 1945, and who was at the time a Deputy Collector:

"Q. (By Mr. Strong): Going back to May 15, 1945, the occasion on which you testified you spoke to Mr. Ormont, on the premises of the Acme Meat Company, with reference to Mr. Ormont's income, will you please state what you said to Mr. Ormont, and what Mr. Ormont said to you in that connection?

* * * * *

Mr. Robnett: Will it be understood that my prior objection to similar questions has been made?

The Court: I think you had better state it for the record.

Mr. Robnett: I object upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; there has been no showing that this man advised the defendant Ormont what his purpose was there, or that anything he might state

could be used against him; that he had a constitutional right to refuse to answer; and no proper foundation.

* * * * *

Mr. Robnett: And on the further ground that there has been no *corpus delicti* established as to the defendant Ormont." [R. Vol. III, pp. 1023, 1024; Vol. IV, pp. 1627, 1638.]

The substance of the testimony of the witness was that they asked him if he had been required to pay other people amounts which were not on the books to which he first said "no" and finally said "yes" and he admitted that he had made extra payments; in answer to the witness' questions as to whether or not he had attempted to pass these overpayments on to his own customers, he said "no", but asked whether or not if an inspector of meat graded as Class "B" meat he had paid Class "A" prices for, if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they come in and determine his income on the presumption that all sales had been so made and he was told "no" [R. Vol. III, pp. 1025-1026].

SPECIFICATION OF ERROR No. 25.

The Court erred in denying appellant's motion to strike the answer of witness PHOEBUS to the question regarding the conversation of May 24, 1945, with Mr. ORMONT, Mr. BIRCHER, Mr. SCHLICK and the witness, who was a Deputy Collector, which motion and question are herein-after set forth:

"Q. Was anything said on that occasion to Mr. Ormont regarding his rights to testify or not to testify? A. Yes, sir.

Q. By whom? A. By Mr. Bircher.

Q. Do you recall what was said? A. Yes, sir.

Q. Will you state what was said? A. Mr. Bircher first asked him if he wanted to have an attorney present.

* * * * *

The Witness: I see. That was the first occasion when these announcements were made to Mr. Ormont.

He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

This is my best recollection of it, or the reply to your question.

* * * * *

The Court: Now in response to the first question that he was *not* entitled to an attorney, what did Mr. Ormont say?

* * * * *

The Witness: Mr. Ormont said he didn't think he needed an attorney to tell the truth, that the thing had been bothering him, worrying him, and he wanted to get it off his mind so that he could go around and look people in the face again. And he repeated that he didn't think he needed an attorney to tell the truth.

Mr. Robnett: If the Court please, move to strike out that answer on the ground that it is incompetent, irrelevant and immaterial. That portion of it where he said he didn't think he needed an attorney to tell the truth might be responsive, but all the rest of it I don't think is in answer to that question. I think it is incompetent. It is improper to go into it at this

time. There was no such warning that I think the law contemplates of his rights in this matter. And as to the fact that they might use it at the time against him, he said that Mr. Bircher said in connection with some other matter, some matter. He didn't tell him as to this particular one, if I understand his answer. I don't know what the other matter was, but that is the way I got the answer to the original question."

(There is some discussion between Court and counsel and counsel asked that the prior statement as to the warning be re-read and it was.)

"Mr. Robnett: Do you see what I mean, your Honor?

The Court: Yes, I do.

That is all that was said to him concerning his rights?

The Witness: I think, your Honor, before we launched into a discussion of Mr. Ormont's income tax liability, Mr. Bircher said, 'All right, then, we will go on and ask you questions and if you don't want to answer any of them just don't answer it, just say so and we will go on to the next question.'

The Court: That is all?

The Witness: Yes, sir.

Mr. Robnett: Now I urge the force of my objection, your Honor, that he wasn't warned that anything would be used against him. He is entitled to be warned as to that. Merely telling a man that he doesn't have to answer is one thing, and if you tell him if he does answer it will be used against him is another thing.

* * * * *

The Court: Well, I think probably it is sufficient. It is awfully thin though.

* * * * *

Q. (By Mr. Strong): Will you state what was said to Mr. Ormont and what Mr. Ormont said in reply in connection with his income for the year 1944 on the occasion to which you have just referred?

* * * * *

Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without repeating it." [R. Vol. III, pp. 1029-1034; Vol. IV, pp. 1627, 1638.]

The substance of the witness' testimony was that in response to a question from Mr. BIRCHER, Mr. ORMONT stated he was sole proprietor of the ACME MEAT COMPANY to May 1, 1944, at which time he became associated with Mr. HIMMELFARB. They had an oral agreement to share the legitimate profits, the first \$24,000.00 of net profits to be shared equally, all amounts over legitimate net profit to go to ORMONT; in addition, they had an agreement to share fifty-fifty the collections of overcharges from the operations of the ACME MEAT COMPANY. This agreement started May 1, 1944, and was discontinued May 18, 1945; that for those years their profit had been about \$35,000.00 apiece. That Mr. ORMONT pulled out a little memo pad or book in which was written figures, showing that between May 1, 1944, until January 5, 1945, the

amount was, roughly, \$12,000.00 and from January 6, 1945, to April 30, 1945, the balance was the remaining of the \$35,000.00; that Mr. BIRCHER copied said page from said book [Exhibit 53] and the witness said there was no way for them to verify the amounts, that no record had been kept, except writing the accumulated amounts to a given date and then throw away the old paper and retain only the current one; that the prices charged people fluctuated, there was no uniform charge per pound made for these overcharges, and that sometimes no charges were made to a customer [R. Vol. III, pp. 1035-1039].

SPECIFICATION OF ERROR No. 26.

The Court erred in denying appellant's motion to strike the answer of the witness concerning the conversation on May 24, 1945, to which Error No. 28 refers:

"Mr. Robnett: Just a minute. All of this 1945 the witness testified to is objected to as not within the issues in this case. We are only going into the 1944 investigation. It is improper to put in evidence here of any kind, and any other year not involved here. It is not charged in the indictment. The charge is as to his income in 1944, and previous years; therefore it is incompetent, irrelevant and immaterial, and the witness is giving a conclusion as to what some papers show, and not pure conversation.

* * * * *

Mr. Robnett: This is not part of the conversation, it is not responsive to the question." [R. Vol. III, pp. 1036-1037; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 27.

The Court erred in overruling the following objection to the following question:

“Q. You didn’t go into the contents of the affidavit? A. The affidavit, the way I remember it, set forth the fact that—

Mr. Robnett: I object to that, if the court please, on the ground that the affidavit would be the best evidence, and this is secondary evidence, incompetent, irrelevant and immaterial, asking for an opinion of the witness as to what it contained. They haven’t shown but what they have copies.” [R. Vol. III, p. 1046; Vol. IV, pp. 1627, 1638.]

The substance of the witness’ testimony was that the affidavit set forth that appellant and Mr. HIMMELFARB had been operating this joint venture and collecting overcharges from customers of the ACME MEAT COMPANY and set forth the amounts which appeared on that slip of paper, showing approximately \$12,000.00 received from ORMONT in 1944 and \$23,000.00 in 1945, set forth that no records or books had been kept.

SPECIFICATION OF ERROR No. 28.

The Court erred in refusing to strike the answer of the witness PHOEBUS for the purpose of an objection, when the witness was asked to place markers in Government’s Exhibit 40 for identification of the portions of said Exhibit which were prepared by the witness and upon which EUSTICE based his testimony, and the following occurred:

“Mr. Strong: The witness Eustice, and you will find in those working papers red place markers. Will you turn to each of those pages and state whether those pages which have those markers were prepared by you? A. Shall I replace the markers?

Q. Yes, leave them there. May we have him put an X on there? That is what I suggested originally. They may get lost.

Yes, you can put an X on there. We have a lot of markers. You can put an X on there, and it won't come out. And put your initials on each of the pages.

* * * * *

The Witness: Do you want me to state, as I mark my initials on it, the document?

Mr. Strong: Yes, please.

A. The capital account of Sam Ormont from January 5, 1931 through March 31, 1943. This I copied from the books of the Acme Meat Company, in their office. The entire page is not written by me, but merely the figures.

Q. Will you circle in red the part you wrote?

A. I also copied the withdrawal account of Sam Ormont, described on the top of my work sheet as summary from March 6, 1937 until March 31, 1943.

Mr. Robnett: Just a minute, your Honor. I would like to move to strike out the answer for the purpose of objecting on the ground that this evidence is incompetent, irrelevant and immaterial, and there is no proper foundation laid for it.

* * * * *

Mr. Robnett: That is true; but I figure that what he says, he copied, that he copied certain things of record, the records would be the best evidence. It is secondary, and secondly, if the records were obtained from the defendants—" [R. Vol. III, pp. 1048-1050; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 29.

The Court erred in overruling the following objection to any and all testimony offered by witness WILLIAM S. MALIN, who was an accountant employed by Mr. MIRMAN, who was then attorney for Mr. ORMONT and Mr. HIMMELFARB:

“Q. Did you at any time during the month of May 1945 meet with the defendant Sam Ormont?”

Mr. Robnett: As to which, your Honor, I wish to interpose an objection, and the objection requires possibly a little evidence to sustain it. It is an objection on the ground that any facts or evidence this witness might testify to are privileged. I would like to have the privilege of asking a few questions of the witness before this question is ruled upon.” [R. Vol. III, p. 1091; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 30.

The Court erred in overruling the following objection to the following question asked of WILLIAM S. MALIN:

“Q. (By Mr. Strong): Was there any discussion at that time with Ormont as to his income?”

Mr. Robnett: I object to that, if the Court please, as privileged, incompetent, irrelevant and immaterial; because the other defendant was present would not change the rule, I don't believe, as to privilege.” [R. Vol. III, p. 1099; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 31.

The Court erred in overruling the following objection to the following question projected to WILLIAM S. MALIN:

“Q. What did you list on Government's Exhibit 42 for identification? A. I listed—

Mr. Robnett: I object to this as incompetent, irrelevant and immaterial, that the bonds and the con-

tents of the box would be the best evidence, and it is a conclusion of the witness as to what is listed. Also it is privileged.”

The witness testified that Exhibit 42 was a list of the bonds in that safe deposit box.

(NOTE: PHOEBUS had previously testified that the box was in the names of two persons [R. Vol. III, p. 1082] and EUSTICE had testified that the list showed that the bonds were in the names of two persons [R. Vol. II, p. 727].)

[R. Vol. III, p. 1105; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 32.

The Court erred in admitting Government's Exhibit 42 in evidence and overruling the following objection thereto:

“Mr. Strong: I offer Government's Exhibit 42 for identification in evidence.

Mr. Robriett: To which I object, if the Court please, on the ground it is incompetent, irrelevant and immaterial, not the best evidence, no proper foundation has been laid. The contents of the bonds themselves would be the best evidence. And this exhibit shows on its face that there are other people interested in those bonds that are listed there on that exhibit and there is no evidence in this case to show that they were all or any of them were Mr. Ormont's bonds.”

Said Exhibit was a list of bonds in the names of Sarah Goldberg, Mrs. Sue Kosdon, Dora Goldberg and Sam Ormont [R. Vol. III, pp. 1105-1106; Vol. IV, pp. 1627, 1638].

SPECIFICATION OF ERROR NO. 33.

The Court erred in overruling the following objection to the admission in evidence of Government's Exhibit 51:

"Mr. Robnett: Your Honor, do I understand there are two exhibits offered, 50 and 51?"

The Court: Yes.

Mr. Robnett: As to 50, I object upon the ground that it is hearsay as to Mr. Ormont; incompetent, irrelevant and immaterial; a privileged communication; and as to 51, that that is a privileged communication, and we claim the privilege. And it is incompetent, irrelevant and immaterial, and further that as to 51, pages 1 and 2 are especially privileged, and probably the last page. These three pages are privileged as to Mr. Ormont, and I want to make a separate objection upon the ground of privilege as to each part of that exhibit on pages 1, 2, 3 and 4.

* * * * *

Mr. Strong: Yes. I would like to have these marked 50-A, B, C, and D.

The Court: Very well.

* * * * *

Mr. Strong: May I have the same thing done with 51, to make it 51-A, B, C and D?

The Court: So ordered.

* * * * *

Mr. Katz: May it please the Court, in order that the objections heretofore interposed to the questions with respect to Exhibit 50 for identification, I would like to interpose them to 50-A, B, C and D as now constituted.

Mr. Robnett: The same would be true of our objections, your Honor.

The Court: It will be so understood. The objections are overruled." [R. Vol. III, pp. 1109, 1110, 1111, 1112; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 34.

The Court erred in overruling the objections to and admitting in evidence Exhibits 51-A and 51-B and in denying motions to strike same, as follows:

“Mr. Robnett: As to 51-A and 51-B, I object on the ground that they are confidential communications and are within the rule prohibiting their use because this witness was an agent for the attorney of Mr. Ormont at the time, and that in addition thereto they are subsequent to all charges in the indictment and do not tend to prove or disprove anything in the issues in the indictment, the indictment in this case being for the year 1944 and the years prior. These are taken long after in 1945.

* * * * *

Mr. Katz: I now move to strike Exhibit 50 on the ground that there is no foundation laid for its admission, as well as on the grounds previously stated.

Mr. Robnett: I join in the objection and also make the same objection to 51-A and 51-B.

The Court: Overruled.” [R. Vol. III, pp. 1114, 1116, 1117; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 35.

The Court erred in overruling the following objection to the following question:

“Mr. Katz: If the Court please, with respect to 50-A and 50-B, I interpose the objection that there is no foundation laid, incompetent, irrelevant and immaterial, that the matters set forth therein are embraced within the privilege communication rule, and not within the issues of the case, and no *corpus delicti* has yet been established, also subsequent in time to the offense included within the indictment as against the defendant Himmelfarb.

* * * * *

Q. When were those statements prepared, 51-A and 51-B and 50-A and 50-B?

Mr. Robnett: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Katz: Same objection heretofore made, if the Court please, if I may make it that way without restating it.” [R. Vol. III, pp. 1113, 1115; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 36.

The Court erred in admitting in evidence Exhibit 51-C and overruled the following objection:

“Q. (By Mr. Strong): I now show you Government’s Exhibit 51-C for identification and ask you if you ever sent that to Mr. Bircher, ever mailed it to him.”

This question had been previously asked and objected to and assigned herein as Error No. 36, to which objection reference is hereby made [R. Vol. III, p. 1117; Vol. IV, pp. 1627, 1638].

SPECIFICATION OF ERROR No. 37.

The Court erred in admitting in evidence Exhibit 51-C and overruling the following objection:

“Mr. Robnett: I want to make a further objection on behalf of Mr. Ormont as to 51-C on the ground that it is incompetent, irrelevant and immaterial, and this is a privileged communication which the witness received from Mr. Ormont through Mr. Ormont’s attorney, and it is therefore a privilege.” [R. Vol. III, p. 1119; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 38.

The Court erred in overruling the following objection to the following question and in denying the motion to strike the answer :

“Q. (By Mr. Strong): Showing you Government’s Exhibit 51-A, which is the statement signed by Sam Ormont, where did you get the information which is contained on that document?

Mr. Robnett: I object, if the Court please, upon the ground that it is incompetent and immaterial and also privileged, where he got the information; and the exhibit speaks for itself.

* * * * *

Mr. Robnett: I move to strike the answer, if the Court please, and also to strike the exhibit itself, 51-A, upon the ground that it is now shown that all of this information was obtained by this gentleman while he was employed by the attorney for Mr. Ormont, and as agent for that attorney, and it is, therefore, privileged, and was privileged, and it is improper to admit it at this time.” [R. Vol. III, pp. 1119, 1120, 1121; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 39.

The Court erred in denying the following motion to strike the answer of the witness and the following objections to the following questions:

“Q. (By Mr. Strong): Where did you get the information which is inserted here: Miscellaneous Enterprises. Where did you get that information?
A. From the attorney, Mr. Mirman.

Mr. Robnett: I move to strike the answer, if the Court please, upon the ground that it is not binding upon this defendant, and would be hearsay.

The Court: Overruled. Motion denied.

Mr. Katz: If the Court please, I interpose the objection, and move to strike upon the ground that it is a privileged communication. The signing of a document disclosing the information contained therein, does not waive the privilege of the source from which the information was obtained.

Mr. Robnett: I would like to join in that.

The Court: Motion denied.

Q. (By Mr. Strong): I show you this item here on the front page, item 12 on the return says, 'other income, state nature of income,' and then the words, 'miscellaneous income, \$71,388.84.' Where did you get that information?

Mr. Robnett: Object to that as having been asked and answered.

Mr. Strong: No, that wasn't the same question, your Honor.

Mr. Robnett: He asked him about the item under miscellaneous income.

Mr. Strong: No, I asked about miscellaneous enterprises, which is another line on top.

Mr. Robnett: Same objection to this question as interposed to the other." [R. Vol. III, pp. 1126-1127; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 40.

The Court erred in overruling the following objections to the following questions:

"Q. (By Mr. Strong): Mr. Witness, as to these sums that are shown here of 50 per cent, \$35,694.42 to Sam Ormont, 50 per cent for \$35,694.42 to Phillip Himmelfarb, did you see any records with reference to those sums?

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial, also that it is privileged.

The Court: The question calls for a yes or no answer, and in view of that the objection is overruled.

The Witness: Well, yes.

Q. (By Mr. Strong): Did you see regular books and records? A. No, sir.

Mr. Robnett: Object to that as asking for an opinion of the witness.

The Court: Objection sustained.

Q. (By Mr. Strong): What did you see? A. A slip of paper on which was written—

Mr. Robnett: I object to that, if the Court please, on the ground that it is privileged and incompetent, irrelevant and immaterial, also leading and suggestive.

The Court: There is no foundation laid as to when he saw it, who was present, and so forth.

Q. (By Mr. Strong): When did you see it?

Mr. Robnett: I object to that.

The Court: He said he saw a piece of paper.

Mr. Robnett: I know. I object to this question as immaterial." [R. Vol. III, pp. 1130-1131; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 41.

The Court erred in permitting the witness DONALD BIRCHER to testify to the conversation of May 24, 1945, being the same conversation previously testified to by witness PHOEBUS, to which objections were made and specified as Error No. 25 and to whose testimony a motion to strike was made and appellant reserved a running objection to that line of testimony, all of which objections and motions are set forth under Specification of Error No. 25, to which reference is hereby made without further repetition. The substance of the testimony given by Mr.

BIRCHER was practically the same as that given by witness PHOEBUS.

That the witness prepared an affidavit which the defendant signed. That thereupon they all went down to the packing plant and while there, Mr. ORMONT asked to see the affidavit he had signed at the office, which was handed to him, together with one prepared for Mr. HIMMELFARB; said he wanted to compare them; he then started folding the two together and Mr. BIRCHER grabbed the affidavits and told the defendant, "Don't do that. You are trying to destroy Government property. Apparently that is what you have in mind. You better be careful. That is very serious. Give it a lot of thought before you do it." Mr. ORMONT held firmly and finally twisted and crushed the paper and took it away and ran out the door to where they were slaughtering cattle and Mr. BIRCHER ran after him and asked him to give the affidavit to him and he said he couldn't. Mr. BIRCHER told him that he had better. They then walked back to the office and had further discussion and the witness said "We told him we would go into the matter further at a later date" [R. Vol. III, pp. 1135-1142, 1145-46; Vol. IV, pp. 1627, 1638-1642].

SPECIFICATION OF ERROR No. 42.

The Court erred in allowing the witness BIRCHER to testify to the contents of the alleged affidavit, being the same affidavit that witness PHOEBUS testified to and whose testimony was objected to, as hereinbefore set forth in Specification of Error No. 30 to which reference is hereby made.

The substance of the testimony of witness BIRCHER, as to the contents of the affidavit, was that Mr. ORMONT had

received approximately \$35,000.00 extra income not reported on his books and the portion which he had received in 1944, he had not reported on his 1944 income tax return [R. Vol. III, pp. 1147-1148; Vol. IV, pp. 1627, 1638].

SPECIFICATION OF ERROR NO. 43.

The Court erred in permitting witness BIRCHER to testify concerning Exhibit 42 and concerning the safe deposit box and the making of a list of the contents thereof and as to the statements of Mr. ORMONT on May 25, 1945, being the same incident testified to by Mr. MALIN over objection and which is hereinbefore assigned as Error No. 31, wherein the objection is set out and to which reference is hereby made.

The substance of the witness' testimony was that Mr. ORMONT opened the safe deposit box and the witness asked Mr. MALIN to take out his work papers and copy in their presence so that they could watch him as each document was taken out of the box by either Mr. ORMONT or by the witness and that Mr. MALIN made a list as the bonds were taken out. Mr. ORMONT stated he had purchased most of the bonds, although they were recorded in his name jointly with the name of his mother, MRS. DORA GOLDBERG. He had purchased them mainly from funds from extra charges he had collected on the side which were not recorded in the books. Some of them he had purchased in earlier years with some of his savings. He noticed that one of the bonds was recorded in his name alone and not in the name of his mother and he jointly, and he asked whether it was possible for him to get it corrected so that it could be in their names jointly; although *it* was his funds, he wanted it in the two names. Said that Mr.

ORMONT came over to the witness and apologized repeatedly. This answer was struck out on motion and the witness was told by Mr. STRONG not to go into the apology at all, but notwithstanding that he again stated that Mr. ORMONT said he wished to apologize for his actions the day before in having taken the affidavit from me forcefully and doing away with it, *and asked what could be done to straighten out the situation.* The witness told him the thing to do was to produce the affidavit and defendant said he couldn't. The defendant told him, "Mr. Bircher, as proof of my patriotism, I want you to know that all this extra money I got on the side I put in war bonds" [R. Vol. III, pp. 1149-1152].

The Court also erred in denying the motion to strike said testimony where Mr. Robnett called the Court's attention to the transcript of the record and quoted certain testimony of Mr. BIRCHER with regard to what he told the defendant regarding the affidavit, and then made the following motion:

"I now, at this time, move to strike all of the testimony of the witness Bircher, as to conversations and transactions that happened after that incident he just testified to, on the ground that thereafter anything that the defendant said or did was of necessity, said and done under threat, and not voluntary, because here he was under a threat, that he had better not do this; he was destroying Government property; it was very serious, and that they would go into that matter further at a later date. And I think it is a sufficient showing to show that the defendant thereafter would be under fear as to anything he might say or do. * * *

* * * * *

“That is my motion, to strike all of that evidence that follows that, the conversation, and all things that happened with regard to his showing them the bonds, letting them take a list of the bonds, and also as to any furnishing of books or records thereafter, on the ground that that was and still is a threat.” [R. Vol. III, pp. 1156-1158.]

SPECIFICATION OF ERROR No. 44.

The Court erred in denying appellant's motion made at the close of plaintiff's case and the renewal thereof at the close of all the evidence to strike all the evidence of witness EUSTICE on the ground that it was admitted over objection, that it is incompetent, irrelevant and immaterial, based largely on hearsay testimony and part of it was hearsay and went in over repeated objection and a running objection thereto and was based upon matters that happened outside the hearing of defendant, conversations the witness had had with other persons, records that he obtained from elsewhere, information he had gotten from other agents and third parties, and that no proper foundation had been laid, and which motion, by renewal incorporated therein prior objections, motions to strike the evidence, including objections, at the outset of the trial against the admission of any evidence, the grounds set forth in the motion to dismiss the indictment and in the motion for a bill of particulars that there was a variance between Count I of the indictment and Exhibit 3 and that all evidence pertaining to the bonds and list of bonds and matters that happened subsequent to the conference on May 24, 1945, was obtained under threat [R. Vol. III, pp. 1234-1244; Motion renewed at close of all evidence, R. Vol. IV, pp. 1366-67].

SPECIFICATION OF ERROR NO. 45.

The Court erred in denying appellant's motion at the close of plaintiff's evidence and the renewal thereof at the close of all evidence to strike the testimony of witness PHOEBUS with regard to the bonds and the bond list and all his oral testimony concerning the same and the funds with which they were purchased on all the grounds set forth in the motion to strike the testimony of witness EUSTICE, summarized in Error No. 47 [R. Vol. III, pp. 1233, 1243-4; Motion renewed at close of all evidence, R. Vol. IV, pp. 1366-67].

SPECIFICATION OF ERROR NO. 46.

The Court erred in denying appellant's motion at the close of plaintiff's evidence to strike all of the testimony of witness BIRCHER with respect to the bonds [R. Vol. III, p. 1244; Vol. IV, pp. 1366, 1367].

SPECIFICATION OF ERROR NO. 47.

The Court erred in denying appellant's motion at the close of plaintiff's evidence and the renewal thereof at the close of all evidence to strike the testimony of witness EUSTICE on pages 843-845 of the typewritten transcript [R. Vol. III, pp. 974-977] with regard to certain bonds, which evidence was admitted over the objection that the books were the best evidence, was asking for opinion of the witness, was incompetent, irrelevant and immaterial.

Said evidence in substance was that the witness was asked if certain checks were shown on the records of the ACME MEAT COMPANY as having been used to pay for bonds for which objection was interposed and was allowed to testify that they did not show and enumerated various acts and referred to Exhibits X, V, O, S, AA to which

testimony objections at that time were interposed on the ground that they were hearsay, books would be the best evidence, it is incompetent, irrelevant and immaterial, no foundation had been laid [R. Vol. III, pp. 1251-1252; Vol. IV, pp. 1366, 1367].

SPECIFICATION OF ERROR No. 48.

The Court erred in denying appellant's motion for an acquittal on all counts of the indictment made at the close of plaintiff's evidence on the ground of insufficiency of the evidence [R. Vol. III, pp. 1252, 1256-1257; Vol. IV, pp. 1627, 1640, point 18].

SPECIFICATION OF ERROR No. 49.

The Court erred in denying appellant's motion for acquittal on Count I at the close of all evidence on all the grounds stated in the motion for acquittal at the close of plaintiff's evidence and including the ground of "once in jeopardy", in response to which the Court said:

"The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.

* * * * *

"I will grant the motion for a judgment of acquittal as to Counts 3 and 4, as to the defendant Sam Ormont; and the case will go to the jury as to the defendant Sam Ormont, on Count 1 only." [R. Vol. IV, pp. 1367, 1369, 1374.]

SPECIFICATION OF ERROR No. 50.

The Court erred in denying appellant's motion made immediately after the Court had acquitted the defendant SAM ORMONT on Counts III and IV (income for 1942 and 1943), reading as follows:

“Mr. Robnett: Your Honor, under those circumstances, I now move to strike all of the testimony and the evidence given by the witness Eustice, as to the years 1942 and 1943, upon the ground that it is incompetent, irrelevant and immaterial, and prejudicial, if it is allowed to remain in before the jury, as to 1944.” [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22.]

SPECIFICATION OF ERROR No. 51.

The Court erred in denying the motion immediately following the above motion and based upon the same grounds to strike all the evidence of witness LINK, pertaining to the years 1942 and 1943 [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22].

SPECIFICATION OF ERROR No. 52.

Prejudicial error was committed by the Government, causing a Deputy United States Marshal to come into open court, while court was in session, in the presence of the jury, and serve the defendant ORMONT with a subpoena *duces tecum* to produce his books and it was assigned as prejudicial misconduct [R. Vol. II, pp. 805, 808]. After the counsel called the matter to the court's attention, they then made this motion [R. Vol. III, p. 890]. The court remarked that the Deputy Marshal was not only a lady, but a good looking lady. Hence the jury must have noticed her serve the defendant.

SPECIFICATION OF ERROR NO. 53.

The U. S. Deputy District Attorney was guilty of prejudicial misconduct in his argument to the jury, in the following particulars which are misstatements of the evidence:

“* * * And you will remember the cross-examination, three or four days of it, testing every iota of statement that was made by Mr. Eustice, testing him right and left, trying Mr. Eustice, did he remember or didn’t he remember, where did he get it, where didn’t he get it, asking hypothetical questions, if this was the fact—*nothing in the record to show that it is the fact*—but if such-and-such is the fact then you subtracted that from this, and you added this to that, what would you have? * * * *There is nothing to show that they did exist, nothing to show that any of these supposition questions are based upon anything than what they purport to be*, if and assume.

“* * * That is all on suppositions, or assumptions—*nothing in the record to show that it happened*.

“You will remember that after all that questioning and all of these checks that we used to ask him, what about this check, what about that check, did you subtract this one and did you add this one, if you did that what would you have? You will remember I took all those checks and I took each one and I said to Mr. Eustice, I said, ‘Now take this check, did you include that amount in the sum which you say is unreported income?’ He said, ‘No, sir.’ (Italics supplied.) [R. Vol. IV, pp. 1456-1457.]

* * * * *

“And we went down the line, and my recollection is that there wasn’t a single check upon which he had

been cross-examined or questioned, *not a single check, that he included as part of the unreported income.*

“Well, if those checks aren’t included as part of the unreported income, what have they to do with this case? You might just as well bring in my checks too and ask him if he deducted those sums what would he have. *It has nothing to do with this case, absolutely nothing.*

“Every single check—and you can examine these checks—some \$6000 in this sum, piles of them, all marked by the defendant and all put before Mr. Eustice and cross-examined, if and maybe and assume, *but not a single one of those checks was taken as part of the unreported income.* And if that is true then there is nothing to worry about those checks, no reason to deduct those checks from the unreported income. *He didn’t take them in. They had nothing to do with the figure which he says is shown to have been the additional sum of money which was furnished by Mr. Ormont and which was not reported.*

“And then we had this business of cross-examination of applications for war savings bonds. Any connection between the applications that were put up by defense counsel concerning which he questioned Mr. Eustice and any of the particular bonds that Mr. Eustice took in as income bought with unreported income? *No connection shown, just as application.*
* * *

“Checks, figures, \$1322.27. ‘Add up these figures,’ I asked Mr. Eustice. ‘Were any of those sums taken in by you as unreported income?’ He said, ‘No, sir.’ It has nothing to do with this case at all. More checks—more checks. [R. Vol. IV, pp. 1458-1459.]

“I ask you if those aren’t some of the extra pieces in the box. We are dealing with a jigsaw puzzle,

with certain evidence. I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. *Very confusing, no doubt about it,* and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get to the final picture. *You will have so many pieces that have nothing to do with it that you may give up.* But I say to you, ladies and gentlemen, that the evidence which shows what was the unreported income is so clear and convincing and completely undisputed, completely undisputed, that there isn't any doubt as to the unreported income and there isn't even any substantial doubt as to what the sum is.

"Now what did Mr. Eustice tell you specifically? The year 1944—I am only going to deal with 1944—he told you how much the original return reported, a sum which was shown as salary, some \$4500. Mr. Eustice said that he found *about \$27,000 more* than Mr. Ormont had earned and hadn't reported. *Rents shown, various other deductions and items shown, unreported. What was the difference?* The difference was between the amount reported, some \$9,000, and the correct amount, some \$36,000.

"*I ask you, is that difference substantial?* Is that a sum that one overlooks in his computations as you might small expenditures for hairpins or something? Is that something that one doesn't take into account or is that something that someone wilfully and deliberately conceals for the purpose of defeating and evading the payment of a substantial part of his tax?

"And as to these figures which are in the record—they might not be precise but your memory is much better than mine, I am sure—Mr. Eustice told you where he got those figures. He told you how he got

them. He told you what he based them on. And there isn't any contradiction as to the figures.

"Yes, there is an attempt to confuse, there is an attempt to drag something else in, but as to the figures as to which he testified, they are all in there. There were one or two items which Mr. Eustice took in as income which might or might not be income, which might be repayment of a loan or something. I don't remember what the items were, but I don't think that they exceeded \$2000. I don't think they even reached \$1000. But the difference between \$1000 which he may have taken in which he shouldn't have—I don't say he did, but if he did—the difference that and the \$26,000 or \$27,000 additional, that is immaterial. That is just a drop in the bucket. That is another extra piece to take your attention off the main figure. (Italics supplied.) [R. Vol. III, p. 1460.]

"I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts *shown on the books and records of the Acme Meat Company* and the amounts shown upon the bank records that are undenied and undisputed as of this amount, and *that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.*

"Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—this thing *went on for so long that after while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on. And that is another thing to consider, as I told you, because this case deals with concealment of money, failure to report*

money and an attempt to defeat and evade a tax. You take into account what goes on with reference to all disclosures and everything. Are you getting complete information, or have you got just the information that Mr. Eustice put in, *undenied, undisputed and corroborated?* I will show you how. (Italics supplied.)

“Mr. Link testified. * * * But the important thing is that he testified to, and the important thing is in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, *is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.* (Italics supplied.)

* * * * *

“And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books because, as he told you, he had never been given those invoices. And what did those invoices show, ladies and gentlemen? Those invoices showed on their face—and they are part of the exhibits; *you can examine them*—but they showed on their face that the money shown on them was paid, the date it was paid, and it had Mr. Ormont’s signature *That is some more money that isn’t on the books, some more money unreported,* some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont. (Italics supplied.) [R. Vol. IV, pp. 1461-1462.]

* * * * *

“The exhibits prepared and signed by the defendant himself, the defendant Ormont, if you will examine them will, on their face, tell you the whole pic-

ture, even if Mr. Eustice were not giving testimony about them; if all you had were the exhibits 51 A, B, C and D; if all you had were the income tax return for 1944; if all you had was the income tax return which shows how much money was earned in that period; those documents alone tell you what the *additional income was*. (Italics supplied.) [R. Vol. IV, p. 1468.]

* * * * *

“* * * But even in the return which he filed on *that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money*. * * * (Italics supplied.)

* * * * *

“Any deductions? *You know, you have deductions when you earn money*; * * * (Italics supplied.) [R. Vol. IV, p. 1471.]

* * * * *

“* * * They disclosed at that time what that money was, and, *if everything was above board, clean honest, and not a violation of law*, why didn't they put it on the return? Why did they have these hieroglyphics. Miscellaneous income, \$71,000.00. No explanation; nothing. * * * (Italics supplied.) [R. Vol. IV, pp. 1473-1474.]

* * * * *

“And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in 1943 out of the \$12,000 he bought about \$8000 worth of bonds. You remember that testimony, \$8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference from that, that the unreported income

which Mr. Eustice claims this man accumulated during that year wasn't really accumulated during that year because he bought \$8000 worth of bonds.

"Take the \$8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find over \$50,000 worth of bonds bought that year—\$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the schedule and it is in evidence.

"What is \$8000 off of that? It is \$42,000. Well, let's assume he had \$8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know. [R. Vol. IV, pp. 1476-1477.]

* * * * *

"* * * And besides that Mr. Malin himself, with information *which he told you he got from the defendant Ormont*, prepared net worth statements too.

* * * (Italics supplied.) [R. Vol. IV, p. 1478.]

* * * * *

"* * * His Honor will tell you that if we do not prove the whole figure, if we prove substantially the figure, *if we prove a substantial amount of money, it is just as good as proving the whole figure.* In other words, you don't have to hold the government to proving precisely that sum of money which is stated in the indictment. Substantially that is enough. And the amount of money shown on that little slip of paper which I have shown you, which is Government's

Exhibit 53, as well as the amount of money which is shown upon these documents which were filed by Mr. Ormont and the accountant, *that is practically the same as the amount shown in the indictment under count 1*. So there isn't any problem as to any variance between the amount shown and the amount that we have established. * * * (Italics supplied.)

“* * * And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—*just forget all about these things that were dragged in and that have nothing to do with this case*, and what does this case consist of? * * * (Italics supplied.) [R. Vol. IV, pp. 1480-1481.]

* * * * *

“* * * If you want to forget everything that Mr. Eustice said and if you just look at that fiscal year return, which shows \$71,000 miscellaneous income for the year beginning May 1, 1944, and ending on April 30, 1945, and *just take 8/12 of that amount, and you will find out how much he earned that year in addition to what he reported. You don't have to look at the books, you don't have to listen to Mr. Eustice, you don't have to listen to anybody. They show it themselves on their returns.* (Italics supplied.) [R. Vol. IV, p. 1549.]

* * * * *

“* * * just because the defendant said to them he only earned \$11,000, that doesn't mean that he only earned \$11,000 extra that year. All that means is that that is all he told them, but he may have earned more, and the income tax return, the fiscal year return, if you take 8/12 of that you will find that it is closer to \$22,000 and not \$11,000.

“But even if it is \$11,000; let us take \$11,000, which he admitted he earned in 1944. *That’s enough.* We don’t have to prove the precise figure. We just have to show *a substantial amount.*

* * * * *

“* * * Do you think anybody who reports income, as Mr. Ormont did, for the year 1944, of \$12,000, and leaves off \$11,000, is not filing a false return? He is reporting only half, according to his story, and only one-third the amount we say was not reported. (*Italics supplied.*) [R. Vol. IV, pp. 1551-1552.]

* * * * *

“* * * *The books speak for themselves. That is why they were admitted in evidence. If they weren’t in evidence they wouldn’t be in this case.* (*Italics supplied.*)

* * * * *

“* * * Why didn’t *they* put Mr. Malin on the stand to tell you about it then? He is just as accessible *to them* as he is to me. And if it is their defense, it is their *witness*. They didn’t put Mr. Moody on, they didn’t put Mr. Malin on.” (*Italics supplied.*) [R. Vol. IV, pp. 1560-1561.]

SPECIFICATION OF ERROR NO. 54.

The Court erred in failing to give the following instruction requested by the defendant to the jury:

“You are instructed to return a verdict of Not Guilty as to Count One of said indictment.” [R. Vol. I, p. 88.]

SPECIFICATION OF ERROR NO. 55.

The Court erred in failing to give the following instruction, No. X-1, requested by the defendant to the jury:

“If the taxpayer acts honestly under the advice of counsel or if the incorrect return is prepared by a Certified Public Accountant or a public accountant, who has knowledge of all the facts, the defendant is not guilty of any criminal intent.” [R. Vol. I, p. 102.]

Appellant contended the instruction was the law as stated in *Kuhn v. U. S.*, 42 F. (2d) 210, and that the evidence in this case showed that appellant had consulted counsel and that the joint venture return was prepared by a Certified Public Accountant and that the appellant had acted under the advice of his attorney who advised the accountant as to what to do. [R. Vol. III, pp. 1094-1095 and 1125.] Exception was duly taken to this refusal. [R. Vol. IV, p. 1396.]

SPECIFICATION OF ERROR NO. 56.

The Court erred in failing to give the following instruction, No. X-2, requested by the defendant to the jury:

“The use of the word ‘attempt’ in the Code indicates that Congress intended some wilful commission in addition to the wilful omission that make up the list of misdemeanors, before a taxpayer can be found guilty of a felony.” [R. Vol. I, p. 102.]

The grounds urged at the trial were that the instruction stated the law and was not covered by any other instruction and that it should be given, because in the absence of “wilful commission,” the acts charged would only

amount to a misdemeanor under Section 145(a), I. R. C. Exception was duly taken to this refusal. [R. Vol. IV, pp. 1397, 1398.]

SPECIFICATION OF ERROR No. 57.

The Court erred in refusing to give the following instruction, No. X-3, requested by the defendant to the jury:

“In weighing the testimony of Internal Revenue officers, greater care should be used than in weighing the testimony of ordinary witnesses because of the natural and unavoidable tendency of such officers to procure and remember with partiality such evidence as would be against defendant.” [R. Vol. I, pp. 102-103.]

The grounds urged for this instruction was that it was a correct statement of the law (Reid Bronson Instructions to Juries, p. 61, sec. 3319), and that the record in this case warranted the giving of the same and that it should be given in order that the jury might be properly advised as to the weighing of such testimony. Exception was taken to such refusal. [R. Vol. IV, pp. 1398-1399.]

SPECIFICATION OF ERROR No. 58.

The Court erred in refusing to give the following instruction, No. X-4, requested by the appellant to the jury:

“In order to establish the guilt of either of the defendants, the government must prove beyond all reasonable doubt not only an attempt to wilfully defraud it, but also that such defendant did actually defraud the government of a substantial portion of the tax due from such defendant, and that such tax was not paid by such defendant.” [R. Vol. I, p. 104.]

The grounds urged for the giving of this instruction were that it was a correct statement of the law [as cited

under No. X-4, R. Vol. I, p. 104], was not covered by any other instruction. Exception was duly taken to such refusal. [R. Vol. IV, p. 1401.]

U. S. v. Schenck, 126 F. (2d) 702;

Gleckman v. U. S., 80 F. (2d) 394;

Tankoff v. U. S., 86 F. (2d) 868;

Hargrove v. U. S., 67 F. (2d) 820;

Rose v. U. S., 128 F. (2d) 622 to 626.

SPECIFICATION OF ERROR NO. 59.

The Court erred in refusing to give the following instruction, No. X-6, requested by the appellant to the jury:

“To establish its case, the government must prove beyond a reasonable doubt that the defendants not only attempted to wilfully defraud the government, but that at the time the indictment in this case was returned, to-wit, on January 22, 1947, a tax in addition to the tax already paid by such defendant remained due and unpaid, and that the defendant knew that he owed such additional tax. You are instructed that in order to convict either of the defendants in this case under the charges embraced in the indictment herein, the government must prove beyond all reasonable doubt that the alleged violations of said act were not only done by the defendant or defendants, but were done wilfully and knowingly, and not under an honest belief by the defendant that he had accounted and paid all tax legally due.” [R. Vol. I, pp. 106-107.]

The grounds urged for this instruction were that it was the law which was laid down in the case of *United States v. Schenk*, 126 F. (2d) 702, and that the facts warranted the giving of the same because the tax had been

paid and that before a charge of wilful evasion can be brought, the tax must be due and owing at the time the indictment is returned. Exception was duly taken to this refusal. [R. Vol. IV, p. 1402.]

SPECIFICATION OF ERROR No. 60.

The Court erred in refusing to give the following instruction, No. X-8, requested by the appellant to the jury:

“Failing to account and pay income tax in the proper year, and paying and accounting for the same in a different year by the taxpayer, and under his honest belief that that is when it is due does not constitute a violation of the Internal Revenue Code.”
[R. Vol. I, p. 105.]

The grounds urged were that it correctly stated the law (*Hargrove v. U. S.*, 67 F. (2d) 820; *Murray v. U. S.*, 117 F. (2d) 40; *Spies v. U. S.*, 317 U. S. 492), and no other instruction was being given thereon by the court and that “wilfully,” as defined by the Court did not properly cover it and that the very defense of the defendant was based upon the proposition that he properly accounted for the tax in a different year under the belief that was correct.

Exception was duly noted to this refusal. [R. Vol. IV, pp. 1403-1406.]

SPECIFICATION OF ERROR No. 61.

The court erred in refusing to give the following instruction, No. X-9, requested by the appellant to the jury:

“Failure of a taxpayer to report income which he honestly believed was not taxable does not constitute a wilful violation of the Internal Revenue Code.”
[R. Vol. I, p. 105.]

The grounds urged were that it correctly stated the law (*U. S. v. Fontaine*, 54 F. (2d) 371; *Murray v. U. S.*, 117 F. (2d) 40) and no other instruction was being given thereon by the Court and that “wilfully,” as defined by the Court did not properly cover it and that the very defense of the defendant was based upon the proposition that he properly accounted for the tax in a different year under the belief that was correct. [R. Vol. IV, pp. 1403-1406.]

SPECIFICATION OF ERROR NO. 62.

The Court erred in refusing to give the following instruction (No. X-8, second one by the Court) requested by the appellant to the jury:

“It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the delinquency of tax and its collection with interest for the delay. If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is fifty per cent thereof.” [R. Vol. I, p. 111.]

The grounds urged were that it was a correct statement of law, as laid down in the case of *Spies v. United States*, 317 U. S. 492, 496-497. Exception was duly taken to such refusal. [R. Vol. IV, p. 1403.]

SPECIFICATION OF ERROR NO. 63.

The Court erred in refusing to give the following instruction, No. X-10, requested by the appellant to the jury:

“You are instructed that if you find from the evidence that defendant Sam Ormont paid all or a sub-

stantial part of the income tax due and owing by him for the calendar year 1944 or paid an amount in excess of the income tax due and owing by him for the calendar year 1944, you must find the defendant Sam Ormont not guilty of Count 1 of the indictment.” [R. Vol. I, pp. 87-88.]

The District Attorney withdrew his objection to instruction X-10 and the Court agreed to give X-10. Thereafter, the Court said he didn’t think he would. Exception was taken to his ruling on the grounds that it was the correct statement of the law and not covered by any other instructions. [R. Vol. IV, pp. 1438, 1439.] It was warranted by the evidence. [R. Vol. II, p. 861; Vol. III, pp. 1078-1079.]

SPECIFICATION OF ERROR No. 64.

The Court erred in refusing to give the following instruction, No. X-12, requested by the appellant to the jury:

“To establish its case, the Government must prove not only an attempt by the defendants wilfully to defraud it, but also that a tax in addition to what the defendants had already paid remains due and owing.” [R. Vol. I, p. 87.]

The grounds urged were that it was a correct statement of the law, as laid down by the case of *United States v. Schenck*, 126 F. (2d) 702, and the case of *Gleckman v. United States*, 80 F. (2d) 394, and other cases. Exception was duly taken to this refusal. [R. Vol. IV, p. 1440.]

SPECIFICATION OF ERROR No. 65.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

“It is a recognized principle of our system of law that in order to convict a defendant, the facts proven must not only be consistent with the theory of guilt, but inconsistent with any reasonable theory of innocence, and this I charge is the law.” [R. Vol. I, p. 93.]

The grounds were assigned for the reason that the Court stated he was giving his own instruction, which fully covered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same. (See *Chandler v. U. S.*, 146 F. (2d) 424, 426; *Williams v. U. S.*, 140 F. (2d) 351, 352; *People v. Koenig*, 29 Cal. (2d) 87, at 92, 93, 173 P. (2d) 1.)

SPECIFICATION OF ERROR No. 66.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

“It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty and the law requires you to, if you can reasonably do so, reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit him.” [R. Vol. I, p. 93.]

The grounds were assigned for the reason that the Court stated he was giving his own instruction, which fully covered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same. (See above cases.)

SPECIFICATION OF ERROR NO. 67.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

“You are instructed that if one set or chain of circumstances leads to two opposing conclusions, one pointing to the guilt, the other to the innocence of the defendant, and the jury has any reasonable doubt as to which of such conclusions the chain of circumstances leads, a reasonable doubt is thereby created, and the defendant should be acquitted.” [R. Vol. I, p. 94.]

The grounds were assigned for the reason the Court stated he was giving his own instruction, which fully covered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same. (See cases above.)

SPECIFICATION OF ERROR NO. 68.

The Court erred in its charge to the jury as follows:

“Any evidence that has been received on an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party, rather than his own testimony in this trial, ought to be viewed by you with caution.” [R. Vol. IV, p. 1567.]

No assignment of error or exception was noted, as appellant's counsel was not served with a copy of any such instructions before it was given. The instruction is not a sufficiently full statement of the law for the reason that it did not advise the jury that before they consider any such declaration of the party that the Govern-

ment must first prove the *corpus delicti*, and the Court nowhere in his charge covered this condition, respecting *declarations*.

Carson v. United States, 147 F. (2d) 542;

Screws v. United States, 89 L. Ed. 1029.

SPECIFICATION OF ERROR No. 69.

The Court erred in its charge to the jury in the following particulars:

“* * * You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed.” [R. Vol. IV, p. 1573.]

This was objected to and appellant specifically requested contrary instruction No. X-3 which was refused by the court [R. Vol. IV, pp. 1398-1399] and Error No. 57, *supra*.

SPECIFICATION OF ERROR No. 70.

The Court erred in its charge to the jury as follows:

“* * * As to any evidence pertaining to the years 1942 and 1943, you are not to consider the same as proof of the crime charged in Count 1, except that if you should find beyond a reasonable doubt that the acts charged against said defendant in Count 1 were done by him, then you may consider the evidence pertaining to 1942 and 1943 for the sole purpose of determining whether or not any such acts as you may find from the evidence were done in 1944, as charged in the indictment, were wilfully and intentionally done by the defendant Ormont.” [R. Vol. IV, p. 1574.]

No special grounds were cited to this instruction, but it was error to instruct the jury that they could consider evi-

dence pertaining to 1942 and 1943 at all and the evidence should have been stricken on defendant's motion. As the Court had found defendant "Not Guilty" in those years. See Errors No. 44, No. 45 and No. 55 and argument and authorities *post*.

SPECIFICATION OF ERROR No. 71.

The Court erred in its charge to the jury as follows:

"The law under which these defendants were indicted in substance provides, as is applicable to this case, that any person who wilfully attempts in any manner to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:

" 'Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for any and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,' shall be punished in the manner provided by law." [R. Vol. IV, pp. 1574-1575.]

This was objected to [R. Vol. III, pp. 1407-1408].

SPECIFICATION OF ERROR No. 72.

The Court erred in his instruction to the jury, when instructing them as to the necessary proof of the sum alleged in the indictment, as follows:

"* * * In other words, the Government need not establish as to Count 1 that the precise sum of \$36,982.52 was the correct net taxable income of the

defendant Ormont for that year. * * * [R. Vol. IV, p. 1576.]

This instruction was objected to and exception taken with the giving thereof on the ground that it was not a proper instruction and did not properly define what the Government must prove and was an improper illustration without telling the jury in the illustration that they must prove *substantially that sum* [R. Vol. III, pp. 1410-1412].

SPECIFICATION OF ERROR No. 73.

The Court erred in charging the jury as follows:

"Also, as to Count 1, I want to call your attention to the fact that it refers to an income and victory tax return, and that since there was no victory tax payable for the year 1944, the words 'victory tax' are surplusage, and may be disregarded by you." [R. Vol. IV, p. 1576].

This was objected to as not a proper statement of law and that the witness should be instructed that the Government would have to prove the charge as alleged in the indictment and this instruction permitted a variance [R. Vol. IV, pp. 1410-1411]. (See argument and authorities, *post*, under Error 7, pp. 104-111.)

SPECIFICATION OF ERROR No. 74.

The Court erred in the following charge to the jury:

"In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944." [R. Vol. IV, p. 1578.]

The above charge was never served on or submitted to appellant's counsel. Hence, no opportunity to accept. See exceptions to Errors Nos. 62-66, inclusive [R. Vol. IV, pp. 1402-1406, 1438-1439].

SPECIFICATION OF ERROR No. 75.

Th Court erred in the following charge to the jury:

“There has been placed in evidence the income tax return for the fiscal year May 1944 to April 1945, which was filed by the defendants on May 24, 1945. In this connection, it is part of your functions to decide whether the defendants actually had some income-producing enterprise, or enterprises, from which they derived the sum of roughly \$71,000, which they reported on that fiscal year basis in that return. In this connection, you must determine what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company, if you decide they were engaged together in the Acme Meat Company, and whether the \$71,000 reported on that return was actually received by them as part of the transactions carried on as the Acme Meat Company, or whether the money was received as income with reference to some other transaction not part of the Acme Meat Company sales and operations.

“Ultimately you are to decide in this connection, among other things, whether the \$71,000 odd dollars reported on the fiscal year return was or was not part of the income derived from the sales made as part of the operations of the Acme Meat Company, and whether that money, or a substantial part of that money, was in fact received by each of the defendants as part of his income from the Acme Meat Company operations; and if not, then whether or not books and records were kept of such other enterprise as required by the statute.

“The statute in that connection, Section 41 of the Internal Revenue Code, reads as follows:

“ ‘The net income shall be computed upon the basis of the taxpayer’s annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer’s annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.’ ” [R. Vol. IV, pp. 1581-1583.]

This was objected to and exception taken on the ground that it was confusing, it pointed out evidence and claimed that evidence tended to prove certain things that were not proven, puts the burden upon the defendants to show a separate enterprise from the ACME MEAT COMPANY, did not tell the jury that if they found this income was received in 1945 and not received in 1944 that they need not consider it and the requesting of proper books was a matter of law and not a fact for the jury to decide [R. Vol. IV, pp. 1431-1433].

SPECIFICATION OF ERROR No. 76.

The Court erred in the following charge to the jury:

“The Internal Revenue regulations, which have the force of law, provide that the type of books *and* rec-

ords which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books *and* records which contain entries which are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in returns, and that such books *and* records shall be kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

“If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums *earned* must be reported upon the calendar year return for the year in which they were earned.” (Italics supplied.) [R. Vol. IV, p. 1583.]

No special exception was taken for the reason that counsel assumed that Government counsel had truthfully stated the regulations, but he did not, as they did not require the keeping of books *and* records and they did not state that if none were kept, the income must be reported in the year *earned*.

SPECIFICATION OF ERROR No. 77.

The Court erred in the following charge to the jury:

“If you find beyond a reasonable doubt that the defendant Ormont, as charged in count 1, did wilfully and intentionally attempt to defeat and evade the *payment of taxes* due to the United States of America by filing a false and fraudulent *return* for the year 1944, in which he failed to disclose the true and correct amount of *income* which he had received during that year, then the government is entitled to a verdict of guilty as to Sam Ormont as to count 1.” (Italics supplied.) [R. Vol. IV, p. 1586.]

This was objected to as a variance from Count I of the indictment, it did not state that the taxes were income taxes or that the income was taxable income or net income or that the “return” must be an “Income and Victory Tax Return” and that it did not state that the taxes must be substantially the amount alleged in the indictment by informing that if the jury found *any* unpaid taxes, they might find the defendant guilty.

The Court also told the jury, in effect, that they could convict if they found a false “return”, yet the indictment charged *an income and victory tax return* and this instruction does not state that it must have been an *income tax* return [R. Vol. IV, pp. 1410-1415].

SPECIFICATION OF ERROR No. 78.

The Court erred in failing to instruct the jury on his own motion that the jury might find the appellant guilty of a lesser offense embraced within the charge in the indictment, namely, a misdemeanor under Section 145(a), I. R. C.

SPECIFICATION OF ERROR No. 79.

The Court erred in denying appellant’s motion for acquittal, notwithstanding the verdict on the grounds set forth in the written motion for dismissal of the indictment, the motion for a bill of particulars, the motion for acquittal at the end of plaintiff’s case and again at the end of all evidence [R. Vol. IV, p. 1609].

SPECIFICATION OF ERROR No. 80.

The Court erred in denying appellant’s motion for a new trial on the grounds embraced within the motion to dismiss the indictment, motion for a bill of particulars, motion of acquittal at the end of plaintiff’s case, motion for acquittal after all the evidence was in [R. Vol. IV, p. 1609].

ARGUMENT.

Specification of Error No. 4.

The Court erred in denying appellant's motion to dismiss and enter a plea of "once in jeopardy" made May 23, 1947, on the record before the Court in this case, showing that a jury had been duly impaneled and sworn to try the defendant and then had been dismissed without his consent [R. Vol. I, pp. 302, 303; Vol. IV, pp. 1627, 1638].

On May 22, 1947, Mr. Katz, attorney for defendant HIMMELFARB, *only* made a motion expressly on behalf of defendant HIMMELFARB to dismiss the indictment [R. Vol. I, p. 246], and a motion to withdraw a juror and declare a mistrial [R. Vol. I, pp. 257-258], to which plaintiff's attorney, Mr. Strong, stipulated [R. Vol. I, p. 259] and the Court thereupon granted the motion and dismissed the jury [R. Vol. I, p. 260]. This was all without the consent of appellant or his counsel and without said counsel being asked whether he consented thereto or not. The case was continued until May 23rd, at which time appellant's counsel made the following motion:

"At this time, on behalf of the defendant Sam Ormont, I wish to make a motion to dismiss—I believe that covers that now—and to enter a plea of once in jeopardy, based upon the record in this case before your Honor, the minutes in this case, showing that a jury was duly impaneled and sworn to try the defendant and has since been discharged, and that the impaneling and swearing of that jury to try him constituted jeopardy. Therefore I move to dismis as to him on the ground that he has been once in jeopardy." [R. Vol. I, p. 303.]

1. No person shall be twice put in jeopardy for the same offense under the constitutional guarantee, and this right is fundamental and cannot be frittered away or abridged by general rules concerning the importance of advancing justice.

Art. V of Amendments to Federal Constitution;

Art. I, Sec. 13, Calif. Const.;

Cornero v. United States, 48 F. (2d) 48, at 74
A. L. R. at 801 (9th C. C. A.).

2. Jeopardy attaches when jury is duly impaneled and sworn. Not necessary for any further proceedings.

Cornero v. United States, supra;

Jackson v. Superior Court, 10 Cal. (2d) 350.

3. A jury once duly impaneled and sworn becomes a part of the tribunal in which the defendant has a vested right to that specific jury, of which right he cannot be divested without his consent.

People v. Young, 100 Cal. App. 18, at 21-22;

Hartzell v. United States, 72 F. (2d) 569 (Iowa
C. C. A. Cert. Den. 55 S. Ct. 216);

50 C. J. S. 927, Note 5 and authorities cited;

Craig v. United States, 81 F. (2d) 816 (C. C. A.
Cal.), 83 F. (2d) 850.

Silence of the accused or his attorney does not constitute consent or a waiver of his constitutional right against being again put in jeopardy.

Barrett v. Bigger, 17 F. (2d) 669, Cert. Den.,
274 U. S. 752;

United States v. Watson, 28 Fed. Cas. #16651;

State v. Stiff, 117 Kan. 243, 234 Pac. 704;

Commonwealth v. Gray, 249 Ky. 36, 60 S. W. (2d)
133.

The Court, in ruling on the motion, said:

“The Court: I was under the impression that the motion was made on behalf of both defendants. Even so, in considering the matter on the merits, I do not think the motion for a once in jeopardy plea is well taken. * * *” [R. Vol. I, p. 304.]

The Court ~~was~~ presumably referred to an oral stipulation entered into in chambers, pertaining to procedural matters sometime prior to the impanelment of the jury, which is set forth in the Record, pages 240-241, to the effect that during the trial, inasmuch as there were two defendants with separate counsel, the Court inquired if, under those conditions, any motions, objections or stipulations made by either defendant may be made on behalf of both defendants, unless they are specifically disclaimed. Then, the Court further stated:

“The Court: Unless it appears obvious from the statement or objection that it applies only to one person, but such general motions or objections that are made throughout the trial will apply to both.” [R. Vol. I, p. 241.]

Appellant's counsel understood this only applied to procedural matters and particularly to objections to evidence in order to simplify the Record [R. Vol. I, p. 304] and this was apparently the Court's interpretation, because immediately following said *oral* stipulation, Mr. Robnett, on behalf of appellant, made a motion and the Court asked the question if that was made on behalf of both defendants, to which Mr. Katz, attorney for the other defendant, said he intended to make a specific motion of his own [R. Vol. I, pp. 241-242], and before Mr. Katz made the motion to discharge the jury and at the opening of that session of Court, Mr. Robnett told the Court that he and his associate counsel had motions to make [R. Vol. I,

p. 245]. Mr. Strong then addressed the Court on some matters. Then the Court said:

“The Court: Very well, Mr. Katz?”

Then Mr. Katz made his said motions, while appellant's counsel waited until he had finished to make motions they had in mind, of which they had just informed the Court. The motions by Mr. Katz were specifically prefaced with a statement that he was making them on behalf of Mr. HIMMELFARB. Therefore, it not only appeared “obvious” but “specific” that the motions he was making were to apply to his client only. However, as was said in the case of *United States v. Watson*, 28 Fed. Case #16651, “The fact that the Court and the District Attorney regarding the defendants as consenting to the Court's action that was taken (discharge of jury) ought not, in the absence from the minutes of the Court of any statement that they consented, to conclude them.” In addition, an attorney under his general employment has no authority in the absence of “specific and express authority” from his client to surrender or stipulate away any substantial right of his client.

7 C. J. S. 897, 922, Note 50;

Glover v. Bradley, 233 Fed. 721;

United States v. Newman, 25 F. (2d) 357 (reversed on other grounds 28 F. (2d) 1684);

Bonnifield v. Thorp, 71 Fed. 924 (appeal dismissed 83 Fed. 1002);

Price v. McComish, 22 Cal. App. (2d) 92 at 97-99 (even though the stipulation was in open court in the presence of his client);

Davidson v. Gifford, 100 N. C. 18, 6 S. E. 718;

Holt v. State, 160 Tenn. 366, 24 S. W. (2d) 886;

Jacobs v. State, 85 Tex. Crim. 505, 213 S. W. 628;
Redsted v. Weiss, 71 Cal. App. (2d) 63;
State v. Crane, 202 Mo. 54, 100 S. W. 422;
Vol. I, Thornton on Attorneys-at-Law, page 386.

Even the consent of accused's counsel to the discharge of the jury after it has been impaneled and sworn is not binding on the accused and does not prevent his reliance on the plea of further jeopardy.

Cliett v. State, 167 Ga. 835, 147 S. E. 35 (39 Ga. App. 510, 147 S. E. 724);
Hipple v. State, Tex. Crim. 191 S. W. 1150,
L. R. A. 1917(d) 1141, 22 C. J. S. 400 (Note
67).

Even though the consent by counsel was in open Court and in the presence of the accused, the latter is not bound unless he is given express authority.

Price v. McComish, *supra*;
Davidson v. Gifford, *supra*.

We quote from the *Price v. McComish* case:

“Nor does the fact that an admission or stipulation was made in open court by an attorney in the presence of his client necessarily vary the rule. In the case of *Davidson v. Gifford* (1888), 100 N. C. 18 (6 S. E. 718), it was said:

“‘Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial do not bind the client. They are not intended to have

such effect, nor does the nature of the relation of attorney and client produce such result. *And this is so, although the client be present when such inconsiderate admissions are made.* It would be rude, indecorous, disorderly, and confusing if the client should interpose to correct his counsel, and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. * * *

Hipple v. State, supra.

Oral stipulations made during a trial and not reduced to writing should be limited so as not to extend beyond the parties thereto clearly intended.

Orr v. Ford, 101 Cal. App. 692, at 699-700, 25 Ruling Case Law 1105.

Stipulations purporting to waive or relinquish a substantial right must be strictly construed.

Burnham v. North Chicago Street Railway Co., 88 Fed. 627;

Carnegie Steel Co. v. Cammria Iron Co., 185 U. S. 403;

Rio Grande Oil Co. v. Upton Oil Co., 33 Ariz. 474, 266 Pac. 3.

Uniform procedure is to specifically ask defendant to personally consent or stipulate and not accept his attorney's stipulation alone.

People v. Baillie, 133 Cal. App. 508, at 511-513.

Specifications of Error Nos. 1, 2 and 3.

Specifications of Error Nos. 1, 2 and 3 being the motion to dismiss the indictment, the motion for a bill of particulars and the motion for a continuance until the bill of particulars was furnished, will be presented together, said Specifications being printed in full in the Appendix, annexed hereto.

Specification No. 1 was a motion to dismiss the indictment on the ground of multifariousness and uncertainty in that it did not state a public offense, did not show that any tax was due or unpaid or how the filing of a victory tax return could defeat or evade the tax for 1944, what portion of alleged tax was victory tax, what portion normal tax and what portion surtax and that a felony and misdemeanor were improperly joined and not separately stated.

The motion for a bill of particulars demanded the items, sums, figures and facts showing the basis of the alleged income and income tax and the sums from which the Government derived such facts, items and figures from which it made its calculations.

The motion for continuance was based upon the ground of surprise, inability to prepare for defense, the cause of insufficiency of the indictment and lack of proper bill of particulars.

“To establish its case the Government must prove not only an attempt *wilfully* to defraud it but also that a tax in addition to what the taxpayer had already paid *remains due and owing*.”

United States v. Schenck, 126 F. (2d) 702;

Hargrove v. United States, 67 F. (2d) 820;

Gleckman v. United States, 80 F. (2d) 394;

Tinkoff v. United States, 86 F. (2d) 868.

It is elementary that every fact necessary to constitute the crime must be directly and positively alleged in the indictment.

42 C. J. S. 972, Sec. 99;

Norton v. United States, 92 F. (2d) 953 (C. C. A. Cal).

Count I of the indictment contained no allegation that any tax, in addition to what the taxpayer had already paid, "remains due and owing," as required by the above authorities. The facts charged in an indictment must be facts and not conclusions.

42 C. J. S. 994, Sec. 114;

United States v. Minnec, 104 F. (2d) 1575;

Boykin v. United States, 11 F. (2d) 484;

Cooper v. United States, 299 Fed. 483.

An allegation that one "owed" an obligation is a conclusion and not a statement of fact, just as the allegation that there is now due is held to be a conclusion.

Frisch v. Caler, 21 Cal. 71;

Roberts v. Treadwell, 50 Cal. 520;

Scrofe v. Clay, 71 Cal. 123;

Knox v. Buckman Contracting Co., 139 Cal. 598.

In the latter case, it is held that the allegation "that the whole of said note is owing * * *" is not an allegation of nonpayment. There, it will be observed, the allegation is in the present, whereas the allegation in Count I of the indictment "he owed" is not.

Under the 1944 Internal Revenue Code, no taxpayer was required to file an "income and victory tax return."

Therefore, the filing of the same, as alleged in Count I of the indictment, would not constitute an attempt to evade a tax and even if such a “so-called” return was filed and even if it were false, it would not be a violation of law because it was nothing upon which the Government could accept as the only return that was authorized that year was a simple income tax return. Failure to file the kind of a return required by the law for that year is not charged as one of the means of attempting to evade.

Kitrell v. United States, 76 F. (2d) 333;

Hargrove v. United States, 67 F. (2d) 820;

Spies v. United States, 317 U. S. 492;

O'Brien v. United States, 51 F. (2d) 193.

The Court should have ordered a bill of particulars, as demanded, as defendant is entitled to such a bill *as a matter of right* where it does not appear from the indictment, with sufficient particularity, what the charges are the defendant will have to defend against, even though the indictment set forth facts constituting the essential elements that it could not be pronounced bad on a motion to dismiss, where the charge is couched in such language that the defendant is liable to be surprised and unprepared.

Singer v. United States, 58 F. (2d) 74;

Wilson v. United States, 270 Fed. 307;

Filiatreau v. United States, 14 F. (2d) 659;

Lett v. United States, 15 F. (2d) 686;

O'Neill v. United States, 19 F. (2d) 322.

Where the allegations in an indictment for evasion of income tax set forth the figures claimed to be correct as gross income or net income, without showing the basis of such figures, and the items composing the same, defendant is entitled to a bill of particulars, showing all such facts as the basis of such figures and the ^{sources} ~~sums~~ from which obtained, in order that he may properly prepare for his defense.

United States v. Empire Paper Corp., 8 Fed. Supp. 220;

United States v. Farrington, 11 Fed. Supp. 215.

which authorities are based upon *Singer v. United States*, *supra*.

No such bill of particulars was ever ordered or furnished and appellant was therefore in the dark and was, of necessity, taken by surprise at the trial and his motion for a continuance of the case until such bill was furnished should have been granted. See authorities above cited.

This was absolutely demonstrated in the progress of the trial, as shown by the statement of the Court, when he granted the acquittal on Counts III and IV and said the whole case was built up by an arbitrary accounting method used by the Government agent [R. Vol. IV, p. 1370]. Naturally, defendant was taken by surprise by such system of accounting and could not possibly prepare for a defense thereto, without first having the bill of particulars as to what basis the Government was using for its calculations.

Specifications of Error Nos. 5 and 6.

The Court erred in denying appellant's motion for immunity and for a dismissal on the ground that appellant was subpoenaed and required to testify before the Grand Jury without being advised of his constitutional rights on matters involved in charges set forth in the indictment in this case [R. Vol. I, pp. 305-307; Vol. IV, pp. 1627, 1638].

The Court erred in denying appellant's motion to suppress all evidence and grant defendant immunity based upon the ground that he had been subpoenaed and required to testify before the Grand Jury, without being first advised of his constitutional rights, on matters embraced within the charge in this case [R. Vol. I, pp. 310, 311; Vol. IV, pp. 1627, 1638-1639; Vol. I, pp. 141-146].

On page 305 of the Record, the following transpired:

"The Court: Do you have any other motions to make out of the presence of the jury, either of you?

Mr. Robnett: We have not received the transcript of the testimony of our defendant before the grand jury, which I understand was to be written up for us.

* * * * *

The Court: That is the transcript that I referred to yesterday, I understand.

Mr. Robnett: Yes.

The Court: Well, your motion for a dismissal now on the ground that the defendant Sam Ormont was called to testify against himself in the indictment as based on that, that is, as to the OPA case—

Mr. Robnett: Yes.

* * * * *

The Court: If you wish to make the motion as a matter of record to protect your record at this time, I will deem it made on the same grounds in this case that you made it in the other case.

Mr. Robnett: I would like to have it so considered then, Your Honor, and that that transcript be considered on that motion.

The Court: I will deny the motion without prejudice to its renewal."

Appellant also made a motion to suppress all evidence pertaining to meat and meat prices, sales and invoices and the like, on the same grounds [R. Vol. I, p. 310].

The motion referred to in the OPA case was an application and a motion for immunity and for an order barring further prosecution of defendant SAM ORMONT, on the ground that he had been subpoenaed before the Grand Jury of the Southern District of California, Central Division, in February, 1946, and compelled to give testimony in an investigation, then pending, of alleged violations of the Emergency Price Control Act in the purchase and sale of meat, and was not advised as to his constitutional rights to refuse to answer any questions, the said written motion in the OPA case, which was considered as made in this case, is set forth in R. Vol. I, pp. 141-150. The evidence given by Mr. ORMONT before said Grand Jury is set forth in full in R. Vol. I, pp. 214-237, and, in substance, was that Mr. ORMONT was asked concerning his slaughtering of cattle; the prices he was paying to have the same slaughtered; and, particularly, those prices he was paying to SOUTHERN CALIFORNIA MEAT COMPANY, THE CALIFORNIA MEAT COMPANY, CHARLES M. KING, HYMAN STILLMAN and LOU SEGAL; and as to

extra services that were being charged him in that connection by those concerns; the profits he made from the sale of beef and veal (this period covered several years, including 1944, and specific testimony as to various and specific amounts of money so paid for extra services). He was asked about various invoices.

An indictment, containing fifty counts, was returned by said Grand Jury in Case No. 18366, U. S. District Court for the Southern District of California, Central Division, against the SOUTHERN CALIFORNIA MEAT COMPANY, INC., CHARLES M. KING, HYMAN STILLMAN and LOU SEGAL and is set forth in full in R. Vol. I, pp. 151-203. The defendants, CHARLES M. KING and SOUTHERN CALIFORNIA MEAT COMPANY entered pleas of guilty in said case [R. Vol. I, p. 204].

The motion to suppress an objection to the introduction of any evidence upon the grounds stated in said applications for immunity and suppression were renewed after the second jury was impaneled and sworn and when the first evidence was offered by the Government [R. Vol. I, pp. 321-322].

A witness who is subpoenaed before a Grand Jury and gives testimony pursuant thereto does so under compulsion.

United States v. Kallas, 272 Fed. 742, 752;

United States v. Kimball, 117 Fed. 156, 163;

Counselman v. Hitchcock, 142 U. S. 547;

In re Simon, 297 Fed. 942;

People v. Schwartz, 78 Cal. App. 561, 570;

People v. O'Brien, 165 Cal. 55, 62.

A witness subpoenaed and compelled to testify is entitled to immunity from future prosecution, whether he claimed it or not at the time he gave the testimony or whether or not he refused to answer on the ground of incrimination.

United States v. Monia, 317 U. S. 424, 87 L. Ed. 376;

United States v. Kallas, *supra*;

United States v. Edgerton, 80 Fed. 374;

United States v. Wetmore, 218 Fed. 227.

“To bring a person within the immunity of this provision (provision of the Constitution), it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending. *It is sufficient if there is a law created by offense under which the witness may be prosecuted.* If there is such a law and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured against any use in a criminal procedure of the evidence he may give; and this can only be done by a statutory provision that *if he submits to an examination and answers the questions, he shall be exempt from criminal prosecution from any offense that may be disclosed as a consequence of his examination.*” (Italics supplied.)

In re Tahbel, 46 Cal. App. 755, at 759;

Counselman v. Hitchcock, *supra*;

Ex parte Clark, 103 Cal. 352;

In re Williams, 127 Cal. App. 424, at 431.

The evidence given by Mr. ORMONT before the Grand Jury not only affected the matter of sales of meat, but the testimony with regard to payment of extra charges for slaughtering which would, of necessity, affect his income and his testimony as to the invoices or such matters and recording of such charges on his books, if such charges were in violation of the OPA regulations, and, presumably, they were, else KING and SOUTHERN CALIFORNIA MEAT COMPANY would not have entered pleas of guilty to the indictment, such extra charges might not be a proper reduction of his income. Therefore, the fact that Mr. ORMONT was subsequently indicted for alleged evasion of income tax for the years covered, this Grand Jury testimony entitled him to immunity from such prosecution. The OPA case, when its written motion for immunity was filed [R. Vol. I, p. 141], was an indictment charging this appellant with violation of the OPA regulations and embraced transactions with the SOUTHERN CALIFORNIA MEAT COMPANY. That the appellant is entitled to immunity in this case, by reason that the Grand Jury testimony is irrevocably affirmed by the United States Attorney for the Southern District of California, Honorable James M. Carter, and his assistant, Mr. William Strong, who on the 9th day of May, 1947, served and filed herein a motion to consolidate the said OPA case and the case at bar [R. Vol. I, pp. 80-84], and in support of said motion they signed points and authorities in which they said:

“Obviously the different offenses charged in each of the two indictments here could have all been joined in one indictment. The defendants are the same in all of the counts in each of the indictments, and *the*

offenses arise out of almost precisely the same series of transactions and facts.

“The proof as to each of the indictments would be almost precisely the same. Evidence which discloses the commission of the offenses with reference to overcharges for sales of meat in violation of the Emergency Price Control Act will be presented in support of the conspiracy count, charging a conspiracy to violate the Emergency Price Control Act. In proof of both the substantive violations and the conspiracy in that respect evidence as to the income of the defendants, the income tax returns and income tax disclosures will also be offered.

“In support of the income tax evasion indictment, the same evidence will be used to prove that the defendants earned the sums which the Government charges them with having received, and that they unlawfully failed to make proper disclosures of their income and pay the proper tax.

* * * * *

“Manifestly, in this instance, consolidation of the indictments for trial is not only wholly proper, but constitutes the most feasible and only practical course of trying these defendants. The consolidation is within the discretion of the trial court: Since both defendants are charged in each count of both indictments, since the offenses charged are ‘of the same or similar character,’ are based substantially ‘on the same act or transaction,’ and are manifestly ‘two or more acts of transactions connected together or constituting parts of a common scheme or plan’ (see Rule 8, *supra*). The requirement of Rule 13, which permits the trial of indictments together ‘if the offenses, and the defendants * * * could have

been joined in a single indictment * * *’ has been fully met.” (*Italics supplied.*) [R. Vol. I, pp. 83-84.]

The appellant in this case did not waive his immunity and, in fact, would not do so, as was stated by Mr. Strong as follows:

“The Court: I do not remember the case, but I remember the old rule which I ran into as a district attorney myself—of course I never had this situation arise because where there was any possibility of a defendant being indicted I always had him sign a waiver of immunity.

Mr. Strong: They wouldn’t do it.” (*Italics supplied.*) [R. Vol. I, p. 276.]

Specification of Error No. 7.

The Court erred in overruling appellant’s objections and admitting Government’s Exhibits Nos. 1, 2, 3 and 4, which objections were as follows:

“Mr. Robnett: * * *

‘Now, Your Honor, take up the offered exhibits. They are in for identification with numbers.

The Court: 1, 2, 3, 4, 5.

Mr. Robnett: Yes. Taking up No. 1, which appears to be an individual income tax return for 1942, for the calendar year, by Sam Ormont, I wish to object to the introduction of that as not being within the issues in the indictment and the plea of the defendant of not guilty, for the reason that the count it would be under—

The Court: Count 4.

Mr. Robnett: I will have no such objection, I see, as to that one.

My objections rather will be to exhibit for identification No. 3, which is the individual income tax return for the calendar year 1944 by Sam Ormont. I object to that on the ground that under the only count in the indictment, No. 1, that that would be applicable, if at all—it is not admissible because it is not within the charge in that count for this reason: This return, if Your Honor will examine it, is a simple return of ordinary taxes and no Victory tax whatever, yet the charge in the indictment of what this defendant did was that he filed a false and fraudulent income and Victory tax.” [R. Vol. I, pp. 335-336; Court’s Ruling, p. 339; Vol. IV, pp. 1627, 1638.]

An examination of Exhibit 3 will show, in bold face type, capital letters, as follows:

“U. S. INDIVIDUAL INCOME TAX RETURN FOR
CALENDAR YEAR 1944”

Nowhere thereon are the words “Victory tax,” either in the total or in any portion of the body of said form of return. A comparison of Exhibit 3 with Exhibit 2, namely, individual income and victory tax return for 1943, will show there was a vast difference between an individual income tax return and an income and victory tax return. For instance, Exhibit 2, in bold face type, capital letters, at the top thereof, reads:

“U. S. INDIVIDUAL INCOME AND VICTORY TAX
RETURN 1943”

and on that first page there appears a separate schedule, set off in brackets or divided with bold face lines, and with the words in large, bold face capital letters, “INCOME

AND VICTORY TAX” and above those words, on line 19, were the words, “Victory tax net income, Item 10, Col. 2 less Item 17, Col. 2.” At the top of page 4 appears “Computation of income and *Victory tax*” and on line 8 thereof are the words “Normal tax,” line 9 “Surtax,” line 10 “Total income tax,” line 12 in bold face type “Balance of Income Tax” and line 13 in bold face type “Net *Victory Tax*” (Line 6 of “*Victory tax* Schedule below”) and line 20 “Total income and *Victory Tax*,” Line 22 in bold face type “Unpaid Balance of Income and *Victory Tax*.” Then follows “Schedule K—*Victory Tax* and underneath are 13 lines of printing, all pertaining to *victory tax* and set off separate under said schedule. Nothing of this kind is set forth in Exhibit 3. The fact of the matter is Exhibit 3 only contains two pages, whereas Exhibit 2, the Income and *Victory Tax* Return, contains four pages.

Count I of the indictment specifically charges the *manner* in which and the *means* by which the Government alleged and claimed defendant and appellant committed the alleged crime. The first such “manner and means” is set forth as follows:

“(1) By preparing and causing to be prepared, and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income and ‘victory tax’ return * * *”

wherein it is claimed that he falsely stated the amount of his income and victory tax. Then they set forth amount of income he reported and the amount of tax he reported and then set forth what they claimed the income tax was, which is a figure some \$23,000.00 greater, and the tax was, which is some \$14,000.00 greater.

VARIANCE.

“It is a uniform rule that the proof must correspond to the allegations; if there is a discrepancy in the indictment, it is a variance.”

42 C. J. S. 1273, Sec. 254;

Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314 (Reversing C. C. A., 73 F. (2d) 78);

Andrews v. United States, 3 F. (2d) 379;

Fox v. United States, 45 F. (2d) 364;

United States v. Wills, 36 F. (2d) 815;

Mulligan v. United States, 120 Fed. 98;

Carney v. United States, 163 F. (2d) 784;

People v. Deysher, 2 Cal. (2d) 141;

People v. Connors, 77 Cal. App. 438.

Allegations which are descriptive of the manner in which a crime is committed cannot be rejected as surplusage, but must be proved as alleged.

People v. Deysher, supra;

People v. Handley, 100 Cal. 370;

People v. Strassman, 112 Cal. 683;

People v. Lapique, 10 Cal. App. 669;

Hightower v. State, 39 Ga. Appeals 674, 148 S. E. 300;

Kutler v. United States, 79 F. (2d) 440;

United States v. Howard, 26 Fed. Case #15403, 3 Sumn. 12, 15.

Thus, in the case of *People v. Deysher, supra*, it was said:

“* * * An allegation otherwise not essential may become material *and must be proved in all cases when descriptive of that which is necessary to the charge.*” (Italics supplied.)

And quoting from the case of *Hightower v. State, supra*:

“If the indictment sets out the offense *as did in a particular way, the proof must show it so, or there will be a variance.* And where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description *the proof must satisfy the description* as well as the main part, since the one is essential to the identity of the other.” (Italics supplied.)

Naftzger v. United States, 200 Fed. 494;

United States v. Brown, 24 Fed. Case #14666, 3 McLean 233;

United States v. Keen, 26 Fed. Case #15510, 1 McLean 429;

United States v. Porter, 27 Fed. Case #16074, Brunn Col. case #54.

See, also, 31 C. J. 837, Sec. 445.

In the case of *People v. Strassman, supra*, defendant was charged with perjury, in which charge it is claimed he made a false affidavit to a bail bond for a party charged with “grand larceny.” The record showed that the bail bond was for release of the party charged with the crime of “robbery” and not “grand larceny.” The Supreme

Court reversed the case and held that there was a variance and said:

“* * * Upon the trial there was no evidence offered to substantiate these averments; no showing was made that proceedings upon a charge of grand larceny were or had been pending against her, and the proof was limited to the establishment of a fact at total variance with the charge in the indictment, namely, that the proceedings against Kate Farley were for the crime of robbery. * * *

* * * * *

“So plainly marked is the variance that the facts themselves foreclose the need of discussion. But in illustration of the principles enunciated, and of their application to cases where the failure or omission has been much less conspicuous than that under review, may be instanced generally the cases of *People v. Coon*, 45 Cal. 672; *People v. Cox*, 40 Cal. 275; *Moore v. State*, 12 Ohio St. 387; *State v. Crogan*, 8 Iowa 523; *Clute v. State*, 19 Minn. 271; * * *.”

In the case of *People v. Coon*, 45 Cal. 672, the charge there was theft of *five* certificates of corporate stock for a stated aggregate number of shares. Proof was of *one certificate* for said number of shares. Variance held fatal.

In the case of *People v. Deysher*, *supra*, defendant (a public officer) was charged with a crime, under Section 71 of the Penal Code, of being interested in a public contract, which contract was alleged in the indictment as a contract for road work on the “Nicasio Road in Road District #5.” This was the only identification of the

contract. The contract offered in evidence and attempted to be proved was a contract for road work at "White Hills in Road District #2." Held that this was a fatal variance and reversed the case on that ground.

People v. Reed, 70 Cal. 529. Defendant was indicted for obtaining under false pretenses a promissory note alleged to have been executed by a certain named person. The note offered in evidence was executed by said named person *and by another*. Held fatal variance and reversed the case for that reason.

In *United States v. Denicke*, 35 Fed. 407, the Court held where a defendant was charged with embezzling from the mails a letter directed to "The Traveler's Ins. Co." The proof shows that it was directed to "The Traders Ins. Co." Variance held fatal. The rule as shown by the foregoing authorities and as universally laid down in 31 C. J. 852, is that any variance between the plea in the indictment and the proof respecting any writing or written instrument is fatal.

In the recent case of *Carney v. United States*, 163 F. (2d) 784, it was held that the defendants were charged with counterfeiting "K14h" gasoline coupons, while the evidence showed "A14h" gasoline coupons. The case was reversed for variance, even though counsel consented to the indictment being amended to conform to the proof.

So, in the case of *People v. Wong Au Leong*, 99 Cal. 440, the defendant was charged with the crime of assault with an intent to commit murder and the indictment al-

leged that the assault was with a deadly weapon, to wit, a knife. At the trial, the prosecution, over objection, introduced evidence that the defendant had a gun. It was held that this was highly prejudicial and reversed the case. In the case at bar, the charge of the “means” by which defendant was supposed to have committed the evasion, namely, by filing a false and fraudulent income and victory tax return, was an essential part of the indictment and it was error to offer evidence of any other kind of an income tax return. Where, in the case of an assault, the crime may be committed in several different ways, an allegation of the manner in which it was committed or the “means” of commission becomes material. Therefore, when in the indictment the manner of commission is set forth the Government is bound thereby, and limited to those manners set forth in the indictment. See *People v. Connors*, 77 Cal. App. 438, in which case the defendant was charged with the crime of “attempting corruptly to influence a trial juror.” The indictment alleged “by means of a written communication” which was set forth in the indictment. We quote from the opinion on page 447:

“It is the settled law that where an instrument in writing constitutes the gravamen of a cause of action or an essential element of the body of the crime or is alleged to have been the specific means by which a crime has been committed, such instrument must be proved substantially, or, perhaps, in many cases, precisely, as it is pleaded. * * *” (Italics supplied.)

Specification of Error No. 8.

The Court erred in overruling appellant's objection to the introduction in evidence of Government's Exhibits 38 and 39, or the introduction of any testimony in connection therewith by witness ERNEST LINK, which objection was as follows:

"Q. (By Mr. Strong): Now may I show you a group of invoices which are marked Government's Exhibit 38 for identification and ask you if you ever saw those before.

Mr. Robnett: If the court please, in connection with these invoices I wish to make an objection that they are incompetent, irrelevant and immaterial, and should not be shown to the witness or any testimony admitted thereon. I have a matter that I would like to present to your Honor."

Thereupon the Court said:

"The Court: Do you have other exhibits of this nature which you wish to have marked for identification with this witness?

Mr. Strong: Just one more.

The Court: In other words, if you can get all the exhibits you are going to use in with this witness, maybe we can wrap all the objections up at one time.

Mr. Strong: Very well.

The Clerk: No. 39.

(The document referred to was marked Government's Exhibit 39 for identification.)"

Exhibits 38 and 39 are 1942 invoices of ACME MEAT COMPANY [R. Vol. I, pp. 398, 399, 400-401, 416; Vol. IV, p 1627].

It was error to admit these exhibits for the reason that there was no sufficient foundation and hence they were incompetent because it was not shown these exhibits were not entered on the books and properly taken into account in 1942, the year they are dated. The witness' only testimony was that he did not believe that he entered them, because they did not bear his special mark [R. Vol. I, p. 415], but that he never checked the books [R. Vol. I, p. 417].

The foregoing evidence was inadmissible because the same was not competent in that it was not of the character of proof which the law permits in the particular case.

31 C. J. S. 530;

Portes v. Valentine, 41 N. Y. Supp. 507, 18 Misc. 213;

Hart v. Newland, 10 N. C. 122.

It is a sufficient objection to the introduction of evidence to say that the same is "incompetent" where the evidence is not proper.

People v. Mullings, 83 Cal. 138, at 144;

31 C. J. 405, Note 59.

Specification of Error No. 23.

This error was set forth in full in the Appendix hereto. Briefly, this error consists of objections to questions asked the witness as to what the books and records of the ACME MEAT COMPANY showed with regard to whether or not Exhibits X, V, O, S and AA, consisting of various cancelled checks, were used to buy bonds, the objections being that the books were the best evidence, that the question was incompetent, irrelevant and immaterial, and calling

for a conclusion of the witness. The objections were overruled and the witness testified that the books, in each instance, did not so show. The Court, in overruling the objection, said that they were not timely and that appellant's counsel had waived them by prior cross-examination of the witness.

The witness had testified that he used the same method of accounting for 1942, 1943 and 1944 [R. Vol. I, p. 549], which was to account for all the funds that came from known sources, and whenever he didn't know the sources, he charged them up as unexplained taxable income. His whole information concerning the bonds was pure hearsay, as it came from Mr. PHOEBUS, and in addition the bonds were in two names [R. Vol. II, p. 727; see, also, Exhibit 42], which made them co-tenants, either as tenants in common or joint tenants. California Civil Code, Sections 682, 685, 686, and under the amendment of January 23, 1940, to Section 123 of Dept. Cir. 530, dated December 15, 1938 (Sec. 315.1 and 2 and 3 of (b) of Title 31, Code of Federal Regulations, Supplement I), it is expressly provided that as to the form of registration of Government—

“Where the bonds are registered in two names in the disjunctive, they are nevertheless co-owners with the right of survivorship.”

The safety deposit box was likewise in the name of two or more persons [R. Vol. III, p. 1082]. Nevertheless, the witness charged all of the bonds to the appellant and where he could not find appellant's record where any of the bonds were paid for, he charged appellant with unreported income, regardless of who paid for it and without any evidence of who paid for it, for that amount. This

is the kind of evidence the Trial Judge referred to when he said, as to Counts II and III, the case was built up on an arbitrary accounting method used by the Government agents [R. Vol. IV, p. 1370], and all of which evidence went in over running objection.

Cross-examination is not a waiver of a prior objection to the witness' testimony.

Jameson v. Tully, 178 Cal. 380, 384;

Balcom v. Growers Warehouse, 55 Cal. App. 482
(holding by Supreme Court in denying petition
for hearing);

Moore v. Norwood, 41 Cal. App. (2d) 368-9.

Further than this, the cross-examination was not on the books and records, but upon the witness' work papers and the witness never was asked on cross-examination as to what the books showed with respect to the checks and exhibits to which the foregoing objections were made, and it was certainly prejudicial error to allow the witness to testify over these objections as to what the books showed.

Specification of Error No. 24.

The Court erred in overruling the following objection to the testimony of witness SAMUEL J. PHOEBUS, occurring on May 18, 1945, and who was at the time a Deputy Collector:

"Q. (By Mr. Strong): Going back to May 15, 1945, the occasion on which you testified you spoke to Mr. Ormont, on the premises of the Acme Meat Company, with reference to Mr. Ormont's income, will you please state what you said to Mr. Ormont, and what Mr. Ormont said to you in that connection?

* * * * *

Mr. Robnett: Will it be understood that my prior objection to similar questions has been made?

The Court: I think you had better state it for the record.

Mr. Robnett: I object upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; there has been no showing that this man advised the defendant Ormont what his purpose was there, or that anything he might state could be used against him; that he had a constitutional right to refuse to answer; and no proper foundation.

* * * * *

Mr. Robnett: And on the further ground that there has been no *corpus delicti* established as to the defendant Ormont." [R. Vol. III, pp. 1023, 1024; Vol. IV, pp. 1627, 1638.]

The substance of the testimony of the witness was that they asked him if he had been required to pay other people amounts which were not on the books to which he first said "no" and finally said "yes" and he admitted that he had made extra payments; in answer to the witness' questions as to whether or not he had attempted to pass these overpayments on to his own customers, he said "no," but asked whether or not if an inspector of meat graded as Class "B" meat he had paid Class "A" prices for, if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they come in and determine his income on the presumption that all sales had been so made and he was told "no" [R. Vol. III, pp. 1025-1026].

The witness subsequently admits that he does not think that there was any warning given to Mr. ORMONT [R.

Vol. III, p. 1028] and then states it was May 24, 1945, when the first pretense was made to advise appellant [R. Vol. III, pp. 1029-1030], although a few days later, on a motion to strike, the Court struck this testimony [R. Vol. III, p. 1246]. This did not cure the error of overruling the objection and did not erase from the minds of the jurors the impression the evidence made, as was said in the case of *People v. Bird*, 132 Cal. 261-264, with respect to such procedure:

“* * * The practice, however, is one not to be commended, for there is inevitably some impression made and effect left upon the minds of the jurors.”

This would be particularly true in a case where so many conversations were admitted and then one of them ordered stricken, without telling the jury what was contained in the conversation, so they could separate it in their minds from conversations that were not stricken.

Specification of Error No. 25.

This error is set forth in full in the Appendix. It was a motion to strike the testimony of witness PHOEBUS as to a conversation with the defendant, witness BIRCHER and others, in which testimony it was claimed the defendant had, in such conversation or conference, made many admissions against his own interests. The witness first testified as to what the defendant was told by Mr. BIRCHER about not having to answer the questions and then, by way of motion to strike and objection, the prior testimony as to what he was told, there was a motion to strike it as incompetent, irrelevant and immaterial and that no proper foundation had been made and that the evidence was not proper at that time, that there was no warning of the constitutional rights of the defendant, and

this objection was a running objection deemed to apply to each and every question concerning the conversation. What the witness said was told the defendant was that he didn't have to answer and "*in connection with another matter* he was told that anything which he said might come out later in open court in some subsequent Government proceeding." It was never told what *such other matter was*. He was told that they were there investigating or checking his income and was never told that what he might say would be used against him in connection with his income tax investigation and therefore the alleged admissions of the defendant were not "voluntary" and were not admissible for any purpose, but were wholly incompetent. Before such confessions can be admitted, the Government must prove that they were voluntary.

Braum v. United States, 168 U. S. 532, 18 S. Ct. 183;

O'Neill v. United States, 19 F. (2d) 322, at 325.

A confession is not voluntary, unless it is proven that it was made freely, voluntary, without having been induced by the expectation of any promise, benefit nor by the fear of any threatened injury.

Litkofsky v. United States, 9 F. (2d) 877;

Wilson v. United States, 162 U. S. 613, 40 L. Ed. 1090, 16 S. Ct. 895;

16 C. J. 717, Sec. 1468;

Braum v. United States, *supra*;

Hopt v. Utah, 110 U. S. 574;

Shaw v. United States, 180 Fed. 348;

Sorenson v. United States, 143 Fed. 820;

Jackson v. United States, 102 Fed. 473.

There was no proof in this case that the confession was freely and voluntarily made, as there was no proof that it was not induced by the expectation of any promised benefit, nor that it was not produced by fear, as was said in the case of *State v. Spanos*, 66 Ore. 118 at 120, 134 Pac. 6:

“It is a fundamental rule of criminal law that a confession cannot be used against a defendant unless the prosecution can show its free and voluntary character, *and that neither duress nor intimidation, hope nor inducement* caused defendant to furnish such evidence against himself.” (Italics supplied.)

In the case of *State v. Dolan*, 86 N. J. Law 192, 194, 90 Atl. 1034, the Court held that a voluntary confession means—

“A confession not extorted by any sort of threats or violence, or obtained by any direct or implied promises.”

16 C. J. 725 lays down the rule as follows:

“Confessions made by accused under the promise *or encouragement of any hope or favor made or held out to him by officers or other persons in authority*, or by a private person in their presence, are not voluntary, and therefore inadmissible, * * *.” (Italics supplied.)

United States v. Pumphreys, 27 Fed. Case No. 16097, 1 Cranch. C. C. 74;

People v. Gonzales, 136 Cal. 666.

In addition thereto, there was not sufficient advice to defendant of his constitutional rights and they did not tell him that it would be used against him in any criminal prosecution of the character here involved, and there is

absolutely no proof that no promises were made, no threats were made or anything of that sort. It was incompetent until they did make such proof in accordance with the above authorities. In addition thereto, subsequently, Mr. BIRCHER was permitted to testify to this same conversation and as to what he told the defendant and as to what the defendant said, hereinafter cited as Specification of Error No. 44, in which Mr. BIRCHER testified that promises were made in this. We quote from his testimony:

“* * * And he [referring to Mr. Ormont] asked specifically whether any statements he made to us might become knowledge available to certain other Government agencies. And I told him that normally any information given the Internal Revenue Department would be held in confidence by that department, but that if a criminal trial should follow, such information might be disclosed at any such trial; * * * He said he did not want to have any trouble; that he wanted to pay whatever was due the Government. * * *” [R. Vol. III, pp. 1136-1137.]

And on cross-examination Mr. BIRCHER testified:

“Q. And at that time Mr. Ormont, *before making any statement of anything else asked you*, did he not, *whether or not anything he might say there would be kept in confidence by you and those present*, or words to that effect? A. Yes, he asked something of that kind.” (Italics supplied.) [R. Vol. III, p. 1172.]

Here was not only an implied promise but an express promise that the Government would keep in confidence whatever Mr. ORMONT said. It further showed that he did not want any trouble and that he would pay anything that was due the Government. Thus, there must be the implied understanding that if the parties investigating

found that Mr. ORMONT was owing the Government any tax, that they would present him with the bill and there would not be any criminal prosecution. And this could be implied from the fact that at that time there was an announced policy by the United States Treasury Department to refrain from criminal prosecutions where the taxpayer made voluntary disclosures. See *United States v. Lustig*, 67 Fed. Supp. 306. In this instance, the witnesses present at said conference expressly promised that this information, if given them, would be kept in confidence and this all occurred *before* the defendant would make any statement, and it was only after receiving such promise that he made any statements and from then on, the defendant, according to all the witnesses, gave them full cooperation and told them repeatedly that if they found he owed any tax, to let him know and he would pay it, but he never was advised of any tax being due, but instead was first served with a warrant in this case. Also, this testimony was not admissible, because before it would become competent, it was necessary for the prosecution to first prove the *corpus delicti*, which was not done.

Further, where the Government introduces evidence of a confession, the burden is on it to establish the absence of duress in obtaining a confession before it is admissible.

Litkofsky v. United States, 9 F. (2d) 877;

Wilson v. United States, 162 U. S. 613, 40 L. Ed. 1090, 16 S. Ct. 895;

Martin v. United States, 254 Fed. 950;

Goff v. United States, 257 Fed. 294.

The foregoing argument applies with equal force to Specification of Error No. 41 which is the error of the Court in allowing witness BIRCHER to testify to this same

conversation with the defendant. Having objected to the testimony of the conversation by Mr. Phoebus, it was unnecessary to make an objection to the same evidence when asked of witness BIRCHER.

64 Corpus Juris 179, Sec. 201;

Salt Lake City v. Smith, 104 Fed. 457;

Moore v. Norwood, 41 Cal. App. (2d) 368, 369;

Balcom v. Grower's Warehouse, 55 Cal. App. 482.

**Specification of Errors Nos. 29, 30, 31, 32, 33, 34, 35,
36, 37, 38, 39, 40.**

These errors all relate to the same matter of objections and evidence and therefore will be argued together. They are set forth in full in the Appendix, pages 9-16. They consisted of objections to any and all testimony offered by Government witness WILLIAM S. MALIN, who was an accountant employed by an attorney, Mr. MIRMAN, who was then the attorney for Mr. ORMONT and Mr. HIMMELFARB jointly, and the nature of the questions asked of the witness referring to matters as to where the witness obtained information and from whom, and in general, his answers that he obtained the information from was said attorney and that he was employed by said attorney. Objections were all based upon the ground that all such matters were privileged and hence were incompetent and inadmissible. Specification of Error No. 32 was with respect to Exhibit 42, namely, a list of bonds. Specification of Error No. 33 was with respect to Exhibits 50-A, 50-B, 50-C and 50-D (originally referred to as 50). These various errors consisted of objections to any evidence concerning said Exhibits or to the introduction thereof in evidence and to the testimony of the witness as to mailing

the same on the grounds that all such exhibits were privileged and that there was no proof of authority from the appellant or said witness to mail the same. The salutary rule of keeping inviolate the communications between client and his attorney and agents, servants, stenographers and clerks, has been extended so as to include all the persons who act as the attorney's agents.

Wigmore on Evidence, Vol. 8, 3rd Ed. Sec. 2301,
p. 584.

The privilege extends to confidential communications by a client to a clerk or agent of the attorney and to the communications by the attorney to such agent.

70 Corpus Juris 501, Sec. 538;

Harves v. State, 88 Ala. 37, 7 So. 302.

The communications between an attorney and an accountant, whom he employed, are privileged.

Walshon v. Stainton, 2 Hen. & M. 1, 71 Reprint
357.

On *voir dire* examination, Mr. MALIN testified that it was Mr. MIRMAN, attorney for Mr. ORMONT and Mr. HIMMELFARB, who employed him in connection with income taxes [R. Vol. III, pp. 1100-1101] and that he took all of his directions from Mr. MIRMAN [R. Vol. III, p. 1095]. This would render him in a confidential relation and would preclude him from giving testimony or from the testimony being extracted from him over objection of privilege which was duly interposed, and applied to all forms of communication whether they be in the forms of

writings or oral communications or whether they be letters.

70 Corpus Juris 376, Sec. 497;

70 Corpus Juris 388, Sec. 521;

Bowman v. Patrick, 32 Fed. 368;

New York Life Insurance Co. v. Ross, 30 F. (2d) 80;

Brown v. Brown, 53 Mo. App. 453;

Continental Casualty Co. v. Vines, 201 Ala. 486, 70 So. 392;

State v. Foster, 164 La. 813, 832, 114 So. 696.

Under the foregoing rule, any person in such confidential relation is by law precluded from divulging any such information, whether written or oral, received in confidence and which is privileged. Therefore, the burden was upon the Government in this case to prove whether the privilege had been waived by the defendant or that he had authorized Mr. MALIN to transmit the writings, Exhibits 50, 51-A, 51-B, 51-C, 51-D and 51-E, to someone else. Otherwise, they were not properly admissible in evidence. No such proof was offered and the objections should have been sustained to each and every one of said exhibits and to each and every one of the questions propounded to the witness.

Specification of Error No. 43.

This Specification of Error is set forth in full in the Appendix on pages 17-18. It consists of a motion to strike all of the testimony of witness BIRCHER as to conversations and transactions occurring after May 24, 1945, on the ground that on that day the defendant was threatened with prosecution for destroying Government property, and thereafter acted under fear and anything that

he said or did was not done voluntarily and was done with such fear, and that acting under such fear he thereafter submitted his books and records to the Internal Revenue Department under the understanding that all matters would be kept confidential, and that if it was found that he owed any tax that they would permit him to adjust the same by payment. This confidence was breached by the agents who submitted their reports to the United States Attorney and to the Grand Jury, without the slightest warning to defendant or without advising the defendant that the Government claimed that he would owe any additional tax or giving him any opportunity to adjust the matter by paying according to the rules of the Treasury Department. The fear is shown by witness BIRCHER'S testimony that defendant repeatedly apologized for what had happened the day before, pertaining to the affidavit and asked him what he could do to straighten it out, and on the day before Mr. BIRCHER had told him the matter would be gone into further, thereby placing the defendant under fear [R. Vol. III, pp. 1145-1146].

Specifications of Errors No. 48 and 49.

The Court erred in denying appellant's motion for an acquittal on all counts of the indictment made at the close of plaintiff's evidence on the ground of insufficiency of the evidence [R. Vol. III, pp. 1252, 1256-1257; Vol. IV, pp. 1627, 1640, Point 18].

The Court erred in denying appellant's motion for acquittal on Count I at the close of all evidence on all the grounds stated in the motion for acquittal at the close of plaintiff's evidence and including the ground of "once in jeopardy", in response to which the Court said:

"The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to

Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.

* * * * *

“I will grant the motion for a judgment or acquittal as to Counts 3 and 4, as to the defendant Sam Ormont; and the case will go to the jury as to the defendant Sam Ormont, on Count 1 only.” [R. Vol. IV, pp. 1367, 1369, 1374.]

The above motion under Specification of Error No. 49 shows that the judge conceded that he had made an error in not granting the prior motion made at the close of plaintiff's evidence and assigned as Specification of Error No. 48, as to Counts III and IV. Before granting the motion as to Counts III and IV, the Court said:

“The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.” [R. Vol. III, p. 1369.]

And in granting the motion at the close of all evidence, the Court used this language:

“But, on Counts 2 and 3, the whole case is built up by an arbitrary accounting method used by the Government agent. * * * I mean in the sense that he takes a figure and says, ‘This is it.’

* * * * *

“The Court: You can't take a person's books, and total his bank accounts, and reach a conclusion, and say that that is unexplained, as you can maybe in a

civil case, where you can weigh the evidence only by the preponderance rule, and would be entitled to judgment. But this is a criminal case.” [R. Vol. IV, pp. 1370-1371.]

And in answer to Mr. Strong’s argument as follows:

“Mr. Strong: Your Honor, there are only some sources from which a person gets money. He either earns it as income, or takes it in as a loan, which he has got to repay, or gets it from somewhere else, which he won’t explain. That is also income.

The Court: Which he won’t explain—there is a difference. If that were the case, there is another crime here, *which these defendants have not been charged* with—refusing to give evidence, or something like that. They might have charged him with the crime of refusing to give the information, but that is a different offense.” (Italics supplied.) [R. Vol. IV, pp. 1372-1373.]

The Government agent, Mr. Eustice, referred to by the Court as using an arbitrary accounting method as to those Counts, testified as to Count I (1944):

“The Witness: The same method of accounting for all the funds of the taxpayer was used in this case [1944] as in 1943 and in 1942. * * *” [R. Vol. II, p. 549.]

Therefore, it should follow, that the motions to acquit on Count 1 should have been granted because, without Mr. EUSTICE’s testimony, there was absolutely no proof of the *corpus delicti* and, of course, that testimony being such as the trial judge labeled as “insufficient” was not sufficient proof of the *corpus delicti* and the Court erred in not granting such acquittal on Count I. This is fur-

ther demonstrated by the evidence of witness EUSTICE himself, who testified that as to 1944 he arbitrarily took as unreported income for that year \$19,257.76 [R. Vol. II, pp. 860, 868]. In the Record, at page 860, the witness said that he took \$19,257.76 from the Joint Venture Return" [Exhibit 6] and set it up as unreported income for 1944 and it was that figure so arbitrarily taken, plus the figure of \$5,550.19, which he had taken as unexplained money in the purchase of bonds (appellant explained in his testimony that it was savings of previous years) [R. Vol. IV, p. 1310] that made up his calculation of unreported income for 1944 of \$24,807.95. And on page 868, the witness said, in trying to explain something to the Court:

"* * * I took into account this sum of \$19,257.76. I don't know of my own knowledge where it came from. * * *"

There was no evidence as to any such income during 1944. The joint venture return ran from May 1, 1944, to April 30, 1945, and in no way showed when the \$35,000.00 was received—whether received mostly or all in 1945 or part of it in 1944. Exhibit 53 does not sustain any such assumption. The most that is indicated in eight months of 1944 and five days of 1945 was a little less than \$12,000.00 received from the joint venture by this appellant. How much was actually received in 1944 is not there shown, but, in any event, it is far cry from the 24,000 odd dollars which the witness claimed as unreported income for 1944 and which was charged in the indictment and this again did not prove the *corpus delicti*. The witness was using declarations from the defendant in his joint venture return which, under the law, could not be used

to establish the *corpus delicti*, and without that joint venture return, the witness did not and could not have testified concerning the 19,000 odd dollars. This was not competent proof whatsoever of the charge in the indictment and if the Court subsequently charged the jury correctly, the Government could not prove a case without proving "substantially the sum alleged as taxable income" in the indictment for the year 1944, which sum so alleged was over \$24,000, and even if it be considered that the witness' testimony was anything more than assumption as to the 5,000 odd dollars, part of which he said was taken as the money purchasing bonds that he could not trace, and assuming that that was income that was unreported, it certainly would not be substantially the sum alleged in the indictment and under the authorities it would be the duty of the Court to acquit the defendant on that point alone.

Tinkoff v. United States, 86 F. (2d) 868 (7th Cir.);

Hargrove v. United States, 67 F. (2d) 820;

Gleckman v. United States, 80 F. (2d) 394;

United States v. Schenck, 126 F. (2d) 702.

See, also, authorities heretofore cited under VARIANCE, particularly 42 Corpus Juris Secundum 1273, Sec. 254, holding that the proof must correspond to the allegations or there is a variance.

There was no evidence that the defendant's place of residence was in the judicial district of the trial court, namely, the Southern District of California, Central Division, nor that the defendant was under obligation to file any tax return in that District or to pay any taxes there or that any taxes were due in that District. These were necessarily elements to be established by the prosecution

in order to make out a case and without such evidence from which the jury could so find it was not proper to submit the matter to the jury.

Price v. United States, 68 F. (2d) 133, cert. den. 34 S. Ct. 640.

There was no substantial evidence of the necessary facts in this case. The Court should have granted the motion for acquittal.

Esposito v. United States, 7 F. (2d) 357;

Wright v. United States, 127 Fed. 353.

"It has been held by a long line of decisions that unless there is substantial evidence of facts which exclude every other hypothesis than guilt, it is the duty of the trial judge to acquit the defendant, and where all the evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

Franklin v. United States, 46 F. (2d) 852, 853;

Morris v. United States, 72 F. (2d) 780, 786;

Boyle v. United States, 131 F. (2d) 570, 572-573;

Shawmut v. United States, 182 Fed. 573, 578.

United States v. Wimmerer, 77 F. (2d) 357, 360.

Cumblum v. United States, 146 F. (2d) 424, 426.

Specification of Errors No. 50 and No. 51.

The Court erred in denying appellant's motion made immediately after the Court had acquitted the defendant SAM DREWESE on Counts III and IV (income for 1942 and 1943), reading as follows:

Mr. Foreman: Your Honor, under those circumstances, I now move to strike all of the testimony & the evidence given by the witness Eustice, as to

the years 1942 and 1943, upon the ground that it is incompetent, irrelevant and immaterial, and prejudicial, if it is allowed to remain in before the jury, as to 1944." [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22.]

The Court erred in denying the motion immediately following the above motion and based upon the same grounds to strike all the evidence of witness LINK, pertaining to the years 1942 and 1943 [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22].

After the Court acquitted the defendant on Counts III and IV, covering the years 1942 and 1943, thereby finding the defendant "not guilty" of the charges as to those two years, appellant's counsel immediately moved, by separate motions, to strike all the testimony of witness EUSTICE, pertaining to those two years, on the ground that they thereby became incompetent, irrelevant and immaterial and had no place in the record and the jury had no right to consider them for any purpose, and a like motion, as to the testimony of witness LINK as to those years. The Court denied these motions which are assigned as errors and relied upon on this appeal. In denying the motions, the Court said that he would allow such evidence to remain in on the question of "intent or wilfulness." This was prejudicial error. Before evidence of the commission of other crimes by accused is admitted, the trial court should satisfy itself that the evidence substantially establishes the other crimes with clear and convincing proof.

22 Corpus Juris Secundum 1112, Sec. 690, and cases there cited, including *Gart v. United States*, 294 Fed. 66 (C. C. A. Colo.).

This Honorable Court, in the case of *Souza v. United States*, 5 F. (2d) 9, 11, held:

“The fact that an unproven charge has been made against one does not tend logically to prove guilt of an offense.”

Paris v. United States, 260 Fed. 529 (C. C. A. Okla.);

Fabacher v. United States, 20 F. (2d) 736.

In the *Paris* case, *supra*, it was held that before guilty intent may be inferred from other similar crimes, they must be established by evidence which is legal and competent and plain, clear, and conclusive.

Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial.

Fish v. United States, 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915A 809.

The Court there said:

“Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case.”

In consideration of this erroneous admission of testimony which was prejudicial to the defendant, the judgment of the trial court will be reversed, and the case remanded for a new trial.

Farkas v. United States, 2 F. (2d) 644;

Weil v. United States, 2 F. (2d) 145.

In this case, as we have shown, the Court has held by its acquittal that the alleged other offenses were never committed and the defendant was not guilty of them. Therefore, there was no evidence which should have gone to the jury. Therefore, it was prejudicial error to allow that evidence to remain before the jury. The evidence of witness EUSTICE covering the years 1942 and 1943 covered practically 500 pages of transcript, as most all of the direct and cross-examination covered those two years (his testimony is found starting on page 507 and ending on page 1014) and most all of the exhibits pertained to those two years and were introduced by the Government on the one hand, as to its exhibits, and the defendants on the other, as to his exhibits, during the examination of this witness, and it was this evidence and these exhibits which were repeatedly referred to by Government attorney STRONG during his arguments to the jury, as we have hereinafter cited [R. Vol. IV, pp. 1456-1459].

To leave this voluminous evidence before the jury could do nothing but confuse and warp their judgment, as was said in the case of *People v. Albertson*, 23 Cal. (2d) at 580, 581, where the Court was there reversing a case where evidence had been allowed as to other offenses and which evidence was insufficient to prove such other offenses:

“Here, the fact that the circumstantial evidence of the prior merely suspicious occurrences was adduced *in great quantity so that it comprises a large part of the voluminous record*, cannot serve as a substitute for ‘substantiality’ where none exists. *This errone-*

*ously admitted proof shows, if anything, that it must by very reason of its voluminousness have tended to confuse the jurors and warp their judgment. Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle. * * **” (Italics supplied.)

As to Mr. LINK’s testimony, more was addressed to those two years than to 1944 and the Court, as to this witness, said:

“* * * I may be pardoned for saying this, but if I had to weigh Mr. Link’s testimony I wouldn’t give it much credence, * * *.” [R. Vol. III, p. 1260.]

With this vast amount of testimony and exhibits left in before the jury, which at best was only confusing and which certainly had no place therein, after the acquittal on those two counts, and Government’s counsel’s argument referring to the great mass of evidence was sufficient in itself to prejudice the jury against the defendant, notwithstanding the acquittal by the Court on those counts and on that evidence, but by leaving the evidence before the jury and then instructing them as he did that they might consider it on the matter of intent, there can be no question but what that fact alone influenced the jury and caused a miscarriage of justice herein.

Specifications of Errors No. 14, No. 15 and No. 53.

These Specifications of Error will be considered together and are set forth in full in the Appendix attached hereto, pages 19-28. These errors consist of prejudicial misconduct of the District Attorney in his argument to the jury.

Error No. 14 consisted of the misconduct of the District Attorney in the examination of witness LINK, wherein he repeatedly attempted to elicit from said witness incompetent and improper evidence, by asking repeated questions, after objections had previously been sustained or the previous answers had been stricken. We set forth the record in the Appendix, attached hereto, beginning at page 441 and ending at page 446, which shows the prejudicial effect of this conduct, even though the Court did strike the answers. The matter got before the jury and the mere striking of the answers after was insufficient to erase the detrimental effect from the memory of the jury.

The error is that the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U. S. 78, 89, 55 S. Ct. 629, 632.

Public interest requires that it is the duty of the Court, on its own motion, to protect the rights of the defendant,

and procedural niceties will not preclude the Court from correcting errors.

Berger v. United States, supra;

N. Y. Central R. Co. v. Johnson, 279 U. S. 310,
318, 49 S. Ct. 300;

Etsel v. Rosenblum, 83 A. C. A. 954-957.

Even though the Court may have correctly ruled upon objections, after the rulings were made or after the mischief had been done, it doesn't remove the error and where there is a pronounced and persistent repetition of an attempt to introduce improper evidence, this in itself would be misconduct.

Berger v. United States, supra.

A single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow.

Pharr v. United States, 48 F. (2d) 767 (C. C. A. 6);.

Pierce v. United States, 86 F. (2d) 949.

The misconduct in the arguments consisted of repeated argument and statement to the jury containing misstatements of the evidence, and stating that the cross-examination of witness EUSTICE was based entirely upon hypothetical questions and that there was nothing in the records to show that the facts based therein were true, but that all such things were purely suppositions or assumptions, and further stating that the witness EUSTICE did not use a single one of the checks in evidence as various exhibits in determining the unreported income which the Government claimed in the indictment. This was repeated many times, as is shown by the Specification of Error No. 53, set forth in the Appendix pages 20-28, and counsel re-

ferred to all such checks and all evidence in cross-examination as merely brought in to confuse the jury and had absolutely nothing to do with the case. To demonstrate the validity of this argument, witness EUSTICE identified a check of \$186 and said he did take it into account as unexplained income [R. Vol. II, p. 678], and he also identified a great list of checks that he took into account as unexplained income [R. Vol. II, pp. 690-691] and another check that was taken into unreported income [R. Vol. II, p. 693]. Testifying concerning Exhibits S and T, S being a check for \$1,332.27 to reimburse Mr. ORMONT for the checks embraced in Exhibit T, the witness said that he did not give credit for said sum as applying on the purchase of bonds, but instead charged that amount and more as unreported income [R. Vol. II, pp. 779-780]. He admits that if Exhibit S was used to purchase bonds, that would change his calculations as to the amount of unexplained income [R. Vol. II, p. 785]. Although the District Attorney said there was no proof as to any of these items, the defendant testified positively that this \$1,332.27 was used by him to purchase bonds [R. Vol. IV, p. 1303]. As to Exhibit Y, EUSTICE admitted that he did take it into account in determining the unreported income [R. Vol. II, pp. 822-823]. Yet the District Attorney told the jury that EUSTICE didn't take any of these checks—not a single one of them—into account and that there was no evidence that any of them were used to purchase bonds. Yet the undisputed testimony of appellant that these checks in Exhibit Y were used to purchase bonds [R. Vol. IV, pp. 1300-1301]. As to Exhibit Z, EUSTICE admitted that he gave no credit for that check on the purchase of bonds, but charged the entire amount of the bonds to unexplained income and did use it in the

calculations [R. Vol. II, pp. 793-794]. Mr. ORMONT testified positively that this check was used to buy bonds [R. Vol. IV, pp. 1300-1321].

The foregoing subsequently shows the falsity of counsel's repeated statements to the jury that there was nothing in the record to show that any of these checks were taken as income or that, in fact, they were used to purchase bonds. Every single check and exhibit that were introduced by the defendant were used by EUSTICE in arriving at his arbitrary conclusion of unreported income. Many of them he arbitrarily charged up to defendant as being used for living expenses, thereby enabling the witness to say that the purchase of certain bonds could not be traced by him [R. Vol. II, pp. 824-825]. He was asked as to a \$800 item whether he considered it in his calculations as available to purchase bonds and he said no, he charged it to personal expenses. On page 825, the Court said:

"The Court: In other words, if you couldn't trace the money to bonds or to some place else you said, well, that is living expenses?"

The Witness: Yes, that is available.

* * * * *

The Court: So if they were used, however, for the purchase of bonds you would have to revise your figures, wouldn't you?

The Witness: That is exactly right, your Honor."

And this was the general nature of his testimony throughout, showing the arbitrary method used to try to show that there was unreported income. The District Attorney's misstatement to the jury is also corroborated by the fact that the Court himself, after this cross-examination and after the evidence of Mr. ORMONT as to

the use of these various checks, found the defendant “not guilty” on Counts III and IV, to which most of the checks pertained. In other words, this evidence that the District Attorney branded as the “red herring” and of the extra pieces of the jig-saw puzzle and as matters drawn in by the defendant for confusion only were indeed the very things which were, on the contrary, very pertinent evidence, so pertinent that the Court labeled the Government’s case as having been built up on an arbitrary method of accounting.

Counsel misstated to the jury “And besides that Mr. Malin himself, with information which he told you he got from the defendant Ormont, prepared net worth statements * * *.” [R. Vol. IV, p. 1478.]

There is no record—on the contrary, the witness testified that he got the testimony from the taxpayer’s records [R. Vol. III, p. 1120]. Counsel told the jury that all they had to prove was a “*substantial amount of money as unreported income.*” This is a misstatement of the law and was misconduct and misleading, as they were required to prove substantially the amount they alleged in their indictment, not merely a substantial amount of money. Counsel misled the jury with regard to bonds for he said that they would find some \$50,000.00 worth of bonds bought in 1943 and supposing Mr. ORMONT did have \$8,000.00 cash from savings that that would leave \$42,000.00 unexplained. This is not the record. As his own witness EUSTICE testified, on counsel’s own examination, he found the source of the purchase of \$37,390.24 worth of said bonds [R. Vol. II, p. 540], and that the only part of the bonds which was “unexplained” was \$14,-084.76. Yet counsel states to the jury that except as to the \$8,000.00 of the \$50,000.00 worth of bonds, there was

no explanation as to where the money came from. Such various statements by the United States Attorney, repeated and repeated to the jury, certainly constituted misconduct and reversible error. Counsel knew that unless he could prejudice the jury against the defendant and his counsel and misstate the evidence that he produced that he could not hope to get a verdict. [R. Vol. IV, pp. 1476-1477.]

This argument, based upon the 1942 and 1943 evidence, demonstrates the error committed by the Court in denying the motions to strike the testimony of Mr. EUSTICE as to said years (Specifications of Error No. 50 and No. 51). Counsel, in referring to the testimony of Mr. LINK, with respect to certain 1942 invoices, stated "that is some more money that isn't on the books, some more money unreported." There is no evidence that it wasn't on the books. LINK testified that he never checked the books as to these invoices. All his testimony was that he didn't enter them, basing his testimony upon the fact that they didn't bear his identification mark [R. Vol. I, p. 417]. Counsel stated that because Mr. ORMONT told Mr. LINK to change some figures on the books that that was falsifying his records. The testimony of LINK himself showed that the change made was of additional money that was actually paid on the purchase of cattle and the Court remarked, "So that the books were accurate when it said that he spent \$3000 more?" Further than this, this error was deliberate, because during the trial, in the presence of the jury, and while the examination of this witness was on this very item, the following occurred:

"Mr. Strong: It proves that the records are false.

The Court: Government counsel's statement to the jury will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel." [R. Vol. II, p. 504.]

This is assigned as Specification of Error No. 15. And yet, although counsel at that time was warned that such statement was not justified and should not have been made to the jury, nevertheless he repeats it to the jury in his argument, and, in addition, it was a untrue statement by counsel, rather than false records.

Counsel also said to the jury:

"* * * The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

Thereby telling the jury that the books were in evidence, which was false. They never were in evidence, nor were they ever produced in Court. Counsel also said:

"* * * Why didn't they put Mr. Malin on the stand to tell you about it then? * * * They didn't put Mr. Moody on, they didn't put Mr. Malin on." [R. Vol. IV, pp. 1559, 1560, 1561.]

The Record in this case shows that Mr. MALIN was a Government informer and his testimony shows that he was adverse to the appellant and this argument of counsel was therefore misconduct.

People v. DePaulo, 23 N. Y. 39, 138 N. E. 498;

People v. Swift, 319 Ill. 359, 150 N. E. 263;

Lowrey v. State, 21 Ala. App. 352, 108 So. 351;

People v. Munday, 280 Ill. 32, 117 N. E. 286, 292.

The cases hold that where witnesses are equally accessible to the prosecution, the prosecuting attorney has no right to comment on the failure of the defendant to put them on the stand.

These miscalculations and misstatements and misconduct assigned could not help but have serious influence with the jury, as they recognize that the prosecutor holds a position of importance and that lends weight to his utterances, as was held in the case of *Latham v. United States*, 226 Fed. 420, 425. Even though objections or assignments were not made at the time, where errors are seriously prejudicial, appellate courts will consider them and correct them.

Skuy v. United States, 261 Fed. 320.

And where the District Attorney is guilty of misconduct, the Court should of its own motion interrupt and correct it.

23 C. J. S. 594, Sec. 1112;

Pierce v. United States, 86 F. (2d) 949.

It is the duty of the District Attorney to treat the accused in a fair and impartial manner, and this applies to his argument to the jury.

Tahaffero v. United States, 47 F. (2d) 699 (9th);

23 C. J. (2d) 540, Sec. 1090;

Ryan v. United States, 99 F. (2d) 484.

Specification of Error No. 65.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

“It is a recognized principle of our system of law that in order to convict a defendant, the facts proven must not only be consistent with the theory of guilt, but inconsistent with any reasonable theory of innocence, and this I charge is the law.” [R. Vol. I, p. 93.]

No grounds were assigned for the reason that the court stated he was giving his own instruction, which fully cov-

ered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same.

In a case where circumstantial evidence is relied upon by the prosecution, it is error to refuse a requested instruction or to fail to include in the instruction given a proper statement of the principle to justify a conviction. The facts or circumstances must not only be consistent with each other and with the conclusions sought to be established, but all the facts and circumstances must be inconsistent with any reasonable theory of the innocence of the defendant, and such facts and circumstances, taken altogether, must be of such conclusive and satisfactory nature as to produce in the minds of the jurors a reasonable and moral certainty that the defendant on trial committed the offense charged. In the case of *People v. Koenig*, 29 Cal. (2d) 87, the Supreme Court held that an instruction to the above effect was improperly refused.

Specification of Error No. 71.

The Court erred in its charge to the jury as follows:

“The law under which these defendants were indicted in substance provides, as is applicable to this case, that any person who wilfully attempts in any manner to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:

“ ‘Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for any and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other

penalties provided by law, be guilty of a felony and, upon conviction thereof,' shall be punished in the manner provided by law." [R. Vol. IV, pp. 1574-1575.]

This was objected to [R. Vol. III, pp. 1407-1408].

The foregoing instruction was erroneous—firstly, there was no evidence in this case that SAM ORMONT was a resident or required to report or pay any income tax within the jurisdiction of said court or that he was one of the class required to file a return or pay tax.

Anderson v. United States, 11 F. (2d) 538.

The Court further tells the jury that the law, as is applicable to this case, is that any person who wilfully attempts "in any manner" to evade or defeat any tax, etc. That was improper, because the indictment in this case alleged the manner, and in so doing, limited the case to that which was alleged, namely, (1) the filing of a false income and victory tax return and (2) concealing from the Collector and other officers of the United States a true and correct gross and net income and the sources thereof. These were the only "manners" involved in this case. Yet the Court told the jury, in effect, that they could find the defendant guilty if he attempted to evade any tax, "in any manner", which would allow them to go outside the indictment and find the defendant guilty ^{not} on the charges in the indictment as to the manner, but on some entirely different manner, as for instance, not keeping books. The Government, having elected by their indictment to charge the defendant with the manner or means, are thereby compelled to prove those allegations and those only, and they were not entitled to a verdict on something else. See the many authorities hereinbefore cited under Error. No. 172 pp. 104-144.

Specification of Error No. 74.

The Court erred in the following charge to the jury:

“In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944.” [R. Vol. IV, p. 1578.]

The above charge was never served on or submitted to appellant's counsel. Hence, no opportunity to ~~except~~. See exceptions to Errors Nos. 62-66, inclusive [R. Vol. IV, pp. 1402-1406, 1438-1439].

This instruction was erroneous and misleading for the reason that it told the jury that if they found that either defendant failed to report his true income in the amount substantially “as *claimed* by the Government.” The Government was represented by MR. STRONG, and in his argument to the jury, he claimed that all that was necessary for the Government to prove was a “substantial amount” and said that \$11,000.00 was enough [R. Vol. IV, pp. 1551-1552]. This was not as charged in the indictment, which was over \$24,000.00 Under the law, it was the amount charged in the indictment that they must substantially prove, and this instruction, by using the word “claimed” instead of “alleged”, was misleading to the jury, as they were not reading the indictment, but were listening to the prosecuting attorney and what he said and could well have been misled by this instruction.

Specification of Error No. 76.

The Court erred in the following charge to the jury:

“The Internal Revenue regulations, which have the force of law, provide that the type of books *and* records which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books *and* records which contain entries which are sufficient to establish the amount of gross income and the deductions, credits and other matters required to be shown in returns, and that such books *and* records shall be kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

“If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums *earned* must be reported upon the calendar year return for the year in which they were earned.” (Italics supplied.) [R. Vol. IV, p. 1583.]

No special exception was taken for the reason that counsel assumed that Government counsel had truthfully stated the regulations, but he did not, as they did not require the keeping of books *and* records and do not state that if none were kept, the income must be reported in the year *earned*.

The foregoing instruction was erroneous for two reasons—firstly, it was not a correct statement of the regulation in that, in effect, it said that the taxpayer must keep “books *and* records” in order to file a fiscal year return, whereas the regulation says he must keep “books *or* records.” Further than that, the Court, in the last paragraph of the above-quoted instruction, told the jury that sums “*earned*” must be reported upon the calendar year

return for the year in which they were “earned”. This is not a correct statement of the law, as a taxpayer, who is on a cash basis, is not required to report any income until it is actually “received” even though it was “earned” in a given year. If it was not so received in that year, he is not required to report it, yet the jury was told here that they might determine that the defendant “earned” certain unreported income in 1944 and if they did, that the law exacted that he should report it for that year whether he had received it or not. This instruction is also inconsistent with and in conflict with the instruction on page 1584 of the Record, reading as follows:

“A taxpayer who is on a cash basis need not report any income on his return that may be due him *until he actually receives the said cash income.*” (Italics supplied.)

It is reversible error to give a jury conflicting and inconsistent instructions on one material point, as they are misleading and it is not for the jury to determine which one is correct and no way for an appellate court to determine which one was followed by the jury.

Nicola v. United States, 72 F. (2d) 780;

People v. Valencia, 43 Cal. 552;

People v. Ross, 19 Cal. App. 469, 473-474;

Noce v. United Railroads, 53 Cal. App. 512 at 519;

23 C. J. S. 895, Sec. 1307, and authorities cited in Notes 38, 40 and 41.

In the case of *People v. Valencia*, *supra*, where conflicting and contradictory instructions were given, the Supreme Court held that they could not disregard such conflict and determine that there was no error, even though

the Court was satisfied that the jury ought to have found the defendant guilty. To the same effect see:

People v. Wong Ah Ngow, 54 Cal. 154;

People v. Messersmith, 57 Cal. 575.

In the case of *People v. Ross*, *supra*, the Court, in reversing the case, said:

“* * * Moreover, instruction No. 15, clearly in conflict with instruction No. 14, was well calculated to, and no doubt did, prevent the jury from giving due or any consideration to the evidence in the light of instruction No. 15. * * *”

In the case of *Guthrie v. Carney*, 19 Cal. App. 145, 155 (cited with approval in the case of *Noce v. United Railroads*, *supra*), the Court said:

“It being impossible to tell which of the several conflicting instructions controlled the verdict of the jury, a material error in any one of them must be deemed to be prejudicial. * * * (Citing several cases).”

The jury, in the case at bar, might have determined that Mr. ORMONT, during the year 1944, “earned” income which he did not report, although he did not “receive” the same until 1945. Nevertheless, under the criticized instructions above, the jury, by following the same, could have and probably did determine this defendant guilty, whereas if they had been asked the specific question as to when he “received” the income, their answer to that might have been in a totally different year, in which event he would have been entitled to a verdict of “not guilty”.

Specification of Error No. 78.

The Court erred in failing to instruct the jury on his own action that the jury might find the appellant guilty of a lesser offense embraced within the charge in the indictment, namely, a misdemeanor under Section 145(a), I. R. C.

It was the duty of the Court, on its own motion, to fully and fairly instruct the jury on all the law relating to the facts of the case and the Court is not relieved of this duty to give instructions whose necessity is developed as to the evidence introduced at the trial, such as instructing the jury of a lesser offense embraced within the greater, instructing them as to admission of confession and the necessity of independent proof of the *corpus delicti* and testimony of expert witnesses, the manner of considering it.

Kinard v. United States, 68 App. D. C. 250, 96 F. (2d) 522, 523;

People v. Putnam, 20 Cal. (2d) 885, at 890, 891;

Kreiner v. United States (2 Cir.), 11 F. (2d) 722, 731;

People v. Best, 13 Cal. App. (2d) 606;

18 U. S. Code, Sec. 565.

The defendant is entitled to rely upon the District Attorney to submit the proper instructions.

People v. Best, supra.

The evidence in this case warranted the giving of such other instructions. As the matters set forth in Count I of the indictment were specifically made misdemeanors under (a) of Section 145, I. R. C., and had the jury

been instructed that they might have found the defendant guilty of a misdemeanor, they might have so found rather than the verdict that they did find, and these instructions as to a lesser offense should be given, even though there is evidence to warrant a conviction of the greater offense:

Hawkes v. State, 51 Ga. App. 317, 180 S. E. 363.

Specification of Error No. 52.

Prejudicial error was committed by the Government, causing a Deputy United States Marshal to come into open court, while Court was in session, in the presence of the jury, and serve the defendant ORMONT with a subpoena *duces tecum* to produce his books and it was assigned as prejudicial misconduct [R. Vol. II, pp. 805, 808]. After the counsel called the matter to the Court's attention, they then made this motion [R. Vol. III, p. 890]. The Court remarked that the Deputy Marshal was not only a lady, but a good looking lady. Hence, the jury must have noticed her serve the defendant.

It is error to call upon a defendant in a criminal case, in the presence of a jury, to testify or produce documents against his will, although he makes no objection thereto.

14 Encyclopaedia of Evidence 646, 647;

McKnight v. United States, 115 Fed. 972, 54 C. C. A. 358;

State v. Merkley, 74 Iowa 695, 39 N. W. 111;

Gillespie v. State, 5 Okla. Crim. 546, 115 Pac. 620 (Ann. Cas. 1912, p. 259).

In the *Gillespie* case, *supra*, the Court said:

“When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon.”

Prior to this incident and while the prosecution was attempting to introduce evidence from the books and records, as against the defendant HIMMELFARB, an objection was raised as to the books being the best evidence and anything else would be hearsay. The prosecuting attorney first tried to lay a foundation by asking witness EUSTICE if he had the books and records, to which he said he did not and where he last left them, and then the following transpired:

“Mr. Strong: We don’t have those books and records, your Honor, but we have some computations which the witness made from them.

Mr. Katz: Neither do we, your Honor.

The Court: I cannot help it. It is still hearsay. Unless you produce the books and records here from which they are made so that the parties themselves may examine them and the jury, if they desire, may look at them.

Mr. Strong: They are not available to us, your Honor. I don’t want to state the reasons in court.

The Court: There are processes of the United States Government to use and you have the processes of this court.

Mr. Strong: Does your Honor suggest that I could use that process in a criminal case as to these books without going further into the books?

The Court: I am not suggesting anything. I am just reminding you that the law is here. Here is the body of the law which you can avail yourself of. I am not saying in advance whether you can correctly or properly do so, but I am saying that you cannot produce a witness on the stand who has gathered information from books which are not here and which the parties do not have available to examine and which the jury can see. Otherwise it is the rankest kind of hearsay.

Mr. Strong: I know it is a little early, but may I ask that your Honor adjourn at this time so that I can attempt to secure these books and records" [R. Vol. II, pp. 599-600.]

All the foregoing transpired immediately in the presence and hearing of the jury and it was prejudicial misconduct by the Court, as well as the District Attorney, and this, connected with the fact that at a later time a Deputy Marshal comes into open court and serves this subpoena on ORMONT, would most certainly leave an unfavorable impression on the minds of the jurors. The Court said, at page 806 of the Record, of the act of the Deputy Marshal, so serving said subpoena:

"The Court: *It is highly improper, certainly, for the Marshal to come in here and hand the defendant any document in the presence of the jury.*" (Italics supplied.)

Although the District Attorney denied that the Marshal was told to do so, it was he, the District Attorney, who obtained the subpoena and, without any order from the trial judge, delivered it to the Deputy Marshal to be served on the defendant and under the authorities we certainly contend that it was gross misconduct and prejudicial error.

Other Assigned Errors Relied Upon.

Neither the space nor the time allotted us will permit us requoting and arguing all of the 80 Specifications of Error hereinbefore set forth, and for those reasons we are not requoting or arguing them separately, but we do rely upon each and every one of the said specified errors and do contend that they do constitute errors as claimed. And we particularly call the Court's attention to Specifications of Errors No. 79 and No. 80, being respectively motion for acquittal notwithstanding the verdict, and motion to a new trial, and we submit that each of these motions was good as shown by all the other previously specified errors.

Wherefore appellant prays for reversal of the judgment, with instructions to the trial court to acquit said defendant.

Respectfully submitted,

DALY B. ROBNETT,

BENJAMIN F. KOSDON,

Attorneys for Appellant.



APPENDIX.

Specification of Error No. 1.

The trial court erred in denying appellant's written motion to dismiss the indictment, filed February 3, 1947, based upon the ground that the Count I did not state a public offense; did not show any tax was due or unpaid; did not show what portion, if any, was unpaid; did not show the gross income; did not show how the filing of a victory tax return could defeat or evade the tax for 1944; did not show the basis for the alleged income claimed by the plaintiff nor what portion of the alleged income tax was victory tax, what portion was normal tax, what portion was surtax; nor who were "proper officers of the United States" from whom it was alleged information was concealed nor how defendant could be guilty of any offense by concealing or attempting to conceal "the sources" of income; that two separate offenses were set forth and not separately stated, a felony for attempting to defeat or evade under (b) of Section 145, I. R. C. joined with a misdemeanor under (a) of Section 145, I. R. C. [R. Vol. I, pp. 24-41, 74-76; Vol. IV, pp. 1627, 1637].

Specification of Error No. 2.

The Court erred in not granting the motion of appellant for a bill of particulars, which motion was filed February 3, 1947, and denied March 12, 1947, and demanded a bill of particulars as to the facts and figures showing the basis of the \$36,982.52 alleged as net income and an itemization of the items, sums and figures used by plaintiff in determining said net income for the calendar year 1944 and a statement of the funds from which derived and the several amounts and various items form-

ing the same and what portion of said sum was the income from the calculation of the normal tax, what portion for surtax and what portion for victory tax; facts and figures showing the basis, figures, credits and deductions in determining the alleged tax of \$18,143.12, and showing what portion thereof was normal tax, what portion was surtax, what portion was victory tax and showing the dates and amounts of credits for payments on account thereof [R. Vol. I, pp. 57-60, 74-76; Vol. IV, pp. 1627, 1638].

Specification of Error No. 3.

The Court erred in denying appellant's motion for a continuance and for a further bill of particulars on May 21, 1947, based upon the grounds enumerated in the original motion for a bill of particulars and upon the ground that neither the indictment nor the bill of particulars which had been furnished disclosed the basis of the figures or items which the Government claims were omitted from the income, nor from whence they were obtained, and the defendant, by reason thereof, was unable to proceed and prepare for defense and was therefore not ready for trial and would be taken by surprise until such bill of particulars was supplied [R. Vol. I, pp. 238, 239, 240, 242].

Specification of Error No. 23.

The Court erred in overruling the following objection to the following question pertaining to Exhibit X and in the following rulings to the following questions:

"Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?

Mr. Robnett: I object to that on the ground that the books would be the best evidence, and it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and nothing to show that it even went to the Acme Meat Company or that they had anything to do with it.

The Court: Let me see the exhibit.

(The document referred to was passed to the court.)

The Court: Your question is what?

(The question referred to was read by the reporter, as follows:

‘Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?’)

The Court: The objection is not timely, counsel. You cross-examined the witness at length upon the records, books, documents and data of the Acme Meat Company and counsel now by that examination I think you have waived any right to the objection which you have made. The objection is overruled.

The Witness: The answer is no.

Q. (By Mr. Strong): Now showing you defendant’s Exhibit V, which is a check dated January 8, 1943, in the sum of \$5000, paid to the order of Sam Ormont, signed Sam Ormont—it is an Acme Meat Company check—do you know whether this check was used to pay for any of the bonds purchased by the defendant Sam Ormont? A. I do not know that it was; no, sir.

Q. And again as to the books and records of the Acme Meat Company which you examined, did they show what that check was used for? A. No, sir. It just indicates that it was money drawn by S. Ormont.

Q. And showing you this document, which is Defendant's Exhibit O, a check dated 5/11/1942, issued by the Acme Meat Company for \$206.11, signed by Sam Ormont, paid to Sam Ormont, do you know whether this check was used to pay for any bonds purchased by the defendant Sam Ormont during or at about that period? A. No, sir; I do not.

Q. As to the books of the Acme Meat Company, do they show that it was used in that way? A. No, sir.

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial.

The Court: As to his examination of them, you mean?

Mr. Strong: As to his examination of them.

Mr. Robnett: It is a conclusion of the witness and the books would be the best evidence. I never asked him, only from his notes as to what his notes showed as to certain things, your Honor. I don't believe it is proper for him to ask what the books show.

The Court: Counsel amended his question to say what his examination of the books showed.

Mr. Strong: That is what I meant all the time.

The Court: That is what you meant all the time?

Mr. Strong: Yes.

The Court: Whether or not he found them?

Mr. Strong: Yes, he of his own knowledge.

The Court: The objection is overruled.

Q. (By Mr. Strong): Do we have an answer?

A. No, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Strong): Now I show you Government's Exhibit S, which is a check of the Acme Meat Company dated 4/26, 1943, in the sum of

\$1332.27, payable to the order of S. Ormont, signed Acme Meat Company by Sam Ormont, and I ask you whether of your own knowledge you know whether this check was used to purchase any bonds by Sam Ormont or in the name of Sam Ormont? A. No, sir; I do not.

Mr. Robnett: Same objection.

The Court: Same ruling.

Q. (By Mr. Strong): Here is another check, Defendant's Exhibit AA, paid to Sam Ormont; and attached to it is a check dated 1/29/43, \$100 paid to S. Ormont, signed Acme Meat Company by Sam Ormont. Do you know whether or not those checks were used to purchase any bonds in the name of Sam Ormont? A. No, sir; I do not know.

Q. And so far as your knowledge of the books and records of the Acme Meat Company, do they show that that was used for that purpose? A. No, sir; they do not." [R. Vol. III, pp. 975-978; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 25.

The Court erred in denying appellant's motion to strike the answer of witness PHOEBUS to the question regarding the conversation of May 24, 1945, with MR. ORMONT, MR. BIRCHER, MR. SCHLICK and the witness, who was a Deputy Collector, which motion and question are hereinafter set forth:

"Q. Was anything said on that occasion to Mr. Ormont regarding his rights to testify or not to testify? A. Yes, sir.

Q. By whom? A. By Mr. Bircher.

Q. Do you recall what was said? A. Yes, sir.

Q. Will you state what was said? A. Mr. Bircher first asked him if he wanted to have an attorney present.

* * * * *

The Witness: I see. That was the first occasion when these announcements were made to Mr. Ormont.

He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

This is my best recollection of it, or the reply to your question.

* * * * *

The Court: Now in response to the first question that he was *not* entitled to an attorney, what did Mr. Ormont say?

* * * * *

The Witness: Mr. Ormont said he didn't think he needed an attorney to tell the truth, that the thing had been bothering him, worrying him, and he wanted to get it off his mind so that he could go around and look people in the face again. And he repeated that he didn't think he needed an attorney to tell the truth.

Mr. Robnett: If the Court please, move to strike out that answer on the ground that it is incompetent, irrelevant and immaterial. That portion of it where he said he didn't think he needed an attorney to tell the truth might be responsive, but all the rest of it I don't think is in answer to that question. I think it is incompetent. It is improper to go into it at this time. There was no such warning that I think the

law contemplates of his rights in this matter. And as to the fact that they might use it at the time against him, he said that Mr. Bircher said in connection with some other matter, some matter. He didn't tell him as to this particular one, if I understand his answer. I don't know what the other matter was, but that is the way I got the answer to the original question."

(There is some discussion between Court and counsel and counsel asked that the prior statement as to the warning be reread and it was.)

"Mr. Robnett: Do you see what I mean, your Honor?

The Court: Yes, I do.

That is all that was said to him concerning his rights?

The Witness: I think, your Honor, before we launched into a discussion of Mr. Ormont's income tax liability, Mr. Bircher said, 'All right, then, we will go on and ask you questions and if you don't want to answer any of them just don't answer it, just say so and we will go on to the next question.'

The Court: That is all?

The Witness: Yes, sir.

Mr. Robnett: Now I urge the force of my objection, your Honor, that he wasn't warned that anything would be used against him. He is entitled to be warned as to that. Merely telling a man that he doesn't have to answer is one thing, and if you tell him if he does answer it will be used against him is another thing.

* * * * *

The Court: Well, I think probably it is sufficient. It is awfully thin though.

* * * * *

Q. (By Mr. Strong): Will you state what was said to Mr. Ormont and what Mr. Ormont said in reply in connection with his income for the year 1944 on the occasion to which you have just referred?

* * * * *

Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without repeating it." [R. Vol. III, pp. 1029-1034; Vol. IV, pp. 1627, 1638.]

The substance of the witness' testimony was that in response to a question from MR. BIRCHER, MR. ORMONT stated he was sole proprietor of the ACME MEAT COMPANY to May 1, 1944, at which time he became associated with MR. HIMMELFARB. They had an oral agreement to share the legitimate profits, the first \$24,000.00 of net profits to be shared equally, all amounts over legitimate net profit to go to ORMONT; in addition, they had an agreement to share fifty-fifty the collections of overcharges from the operations of the ACME MEAT COMPANY. This agreement started May 1, 1944, and was discontinued May 18, 1945; that for those years their profit had been about \$35,000.00 apiece. That MR. ORMONT pulled out a little memo pad or book in which was written figures, showing that between May 1, 1944, until January 5, 1945, the amount was, roughly, \$12,000.00, and from January 6, 1945, to April 30, 1945, the balance was the remaining of the \$35,000.00; that MR. BIRCHER copied said page from said book (Exhibit 53) and the witness said there was no way for them to verify the

amounts, that no record had been kept, except writing the accumulated amounts to a given date and then throw away the old paper and retain only the current one; that the prices charged people fluctuated, there was no uniform charge per pound made for these overcharges, and that sometimes no charges were made to a customer [R. Vol. III, pp. 1035-1039].

Specification of Error No. 29.

The Court erred in overruling the following objection to any and all testimony offered by witness WILLIAM S. MALIN, who was an accountant employed by MR. MIRMAN, who was then attorney for MR. ORMONT and MR. HIMMELFARB:

“Q. Did you at any time during the month of May 1945 meet with the defendant Sam Ormont?

Mr. Robnett: As to which, your Honor, I wish to interpose an objection, and the objection requires possibly a little evidence to sustain it. It is an objection on the ground that any facts or evidence this witness might testify to are privileged. I would like to have the privilege of asking a few questions of the witness before this question is ruled upon.” [R. Vol. III, p. 1091; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 30.

The Court erred in overruling the following objection to the following question asked of WILLIAM S. MALIN:

“Q. (By Mr. Strong): Was there any discussion at that time with Ormont as to his income?

Mr. Robnett: I object to that, if the Court please, as privileged, incompetent, irrelevant and immaterial; because the other defendant was present would not change the rule, I don't believe, as to privilege.” [R. Vol. III, p. 1099; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 31.

The Court erred in overruling the following objection to the following question projected to WILLIAM S. MALIN:

“Q. What did you list on Government’s Exhibit 42 for identification? A. I listed—

Mr. Robnett: I object to this as incompetent, irrelevant and immaterial, that the bonds and the contents of the box would be the best evidence, and it is a conclusion of the witness as to what is listed. Also it is privileged.”

The witness testified that Exhibit 42 was a list of the bonds in that safe deposit box.

(NOTE: PHOEBUS had previously testified that the box was in the names of two persons [R. Vol. III, p. 1082] and EUSTICE had testified that the list showed that the bonds were in the names of two persons [R. Vol. II, p. 727].) [R. Vol. III, p. 1105; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 32.

The Court erred in admitting Government’s Exhibit 42 in evidence and overruling the following objection thereto:

“Mr. Strong: I offer Government’s Exhibit 42 for identification in evidence.

Mr. Robnett: To which I object, if the Court please, on the ground it is incompetent, irrelevant and immaterial, not the best evidence, no proper foundation has been laid. The contents of the bonds themselves would be the best evidence. And this exhibit shows on its face that there are other people interested in those bonds that are listed there on that

exhibit and there is no evidence in this case to show that they were all or any of them were Mr. Ormont's bonds."

Said Exhibit was a list of bonds in the names of Sarah Goldberg, Mrs. Sue Kosdon, Dora Goldberg and Sam Ormont [R. Vol. III, pp. 1105-1106; Vol. IV, pp. 1627, 1638].

Specification of Error No. 33.

The Court erred in overruling the following objection to the admission in evidence of Government's Exhibit 51:

"Mr. Robnett: Your Honor, do I understand there are two exhibits offered, 50 and 51?

The Court: Yes.

Mr. Robnett: As to 50, I object upon the ground that it is hearsay as to Mr. Ormont; incompetent, irrelevant and immaterial; a privileged communication; and as to 51, that that is a privileged communication, and we claim the privilege. And it is incompetent, irrelevant and immaterial, and further that as to 51, pages 1 and 2 are especially privileged, and probably the last page. These three pages are privileged as to Mr. Ormont, and I want to make a separate objection upon the ground of privilege as to each part of that exhibit on pages 1, 2, 3 and 4.

* * * * *

Mr. Strong: Yes. I would like to have these marked 50-A, B, C, and D.

The Court: Very well.

* * * * *

Mr. Strong: May I have the same thing done with 51, to make it 51-A, B, C, and D?

The Court: So ordered.

* * * * *

Mr. Katz: May it please the Court, in order that the objections heretofore interposed to the questions with respect to Exhibit 50 for identification, I would like to interpose them to 50-A, B, C and D as now constituted.

Mr. Robnett: The same would be true of our objections, your Honor.

The Court: It will be so understood. The objections are overruled." [R. Vol. III, pp. 1109, 1110, 1111, 1112; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 34.

The Court erred in overruling the objections to and admitting in evidence Exhibits 51-A and 51-B and in denying motions to strike same, as follows:

"Mr. Robnett: As to 51-A and 51-B, I object on the ground that they are confidential communications and are within the rule prohibiting their use because this witness was an agent for the attorney of Mr. Ormont at the time, and that in addition thereto they are subsequent to all charges in the indictment and do not tend to prove or disprove anything in the issues in the indictment, the indictment in this case being for the year 1944 and the years prior. These are taken long after in 1945.

* * * * *

Mr. Katz: I now move to strike Exhibit 50 on the ground that there is no foundation laid for its admission, as well as on the grounds previously stated.

Mr. Robnett: I join in the objection and also make the same objection to 51-A and 51-B.

The Court: Overruled." [R. Vol. III, pp. 1114, 1116, 1117; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 35.

The Court erred in overruling the following objection to the following question:

“Mr. Katz: If the Court please, with respect to 50-A and 50-B, I interpose the objection that there is no foundation laid, incompetent, irrelevant and immaterial, that the matters set forth therein are embraced within the privilege communication rule, and not within the issues of the case, and no corpus delicti has yet been established, also subsequent in time to the offense included within the indictment as against the defendant Himmelfarb.

* * * * *

Q. When were those statements prepared, 51-A and 51-B and 50-A and 50-B?

Mr. Robnett: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Katz: Same objection heretofore made, if the Court please, if I may make it that way without restating it.” [R. Vol. III, pp. 1113, 1115; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 36.

The Court erred in admitting in evidence Exhibit 51-C and overruled the following objection:

“Q. (By Mr. Strong): I now show you Government’s Exhibit 51-C for identification and ask you if you ever sent that to Mr. Bircher, ever mailed it to him.”

This question has been previously asked and objected to and assigned herein as Error No. 36, to which objection reference is hereby made [R. Vol. III, p. 1117; Vol. IV, pp. 1627, 1638].

Specification of Error No. 37.

The Court erred in admitting in evidence Exhibit 51-C and overruling the following objection:

“Mr. Robnett: I want to make a further objection on behalf of Mr. Ormont as to 51-C on the ground that it is incompetent, irrelevant and immaterial, and this is a privileged communication which the witness received from Mr. Ormont through Mr. Ormont’s attorney, and it is therefore a privilege.” [R. Vol. III, p. 1119; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 38.

The Court erred in overruling the following objection to the following question and in denying the motion to strike the answer:

“Q. (By Mr. Strong): Showing you Government’s Exhibit 51-A, which is the statement signed by Sam Ormont, where did you get the information which is contained on that document?

Mr. Robnett: I object, if the Court please, upon the ground that it is incompetent and immaterial and also privileged, where he got the information; and the exhibit speaks for itself.

* * * * *

Mr. Robnett: I move to strike the answer, if the Court please, and also to strike the exhibit itself, 51-A, upon the ground that it is now shown that all of this information was obtained by this gentleman while he was employed by the attorney for Mr. Ormont, and as agent for that attorney, and it is, therefore, privileged, and was privileged, and it is improper to admit it at this time.” [R. Vol. III, p. 1119, 1120, 1121; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 39.

The Court erred in denying the following motion to strike the answer of the witness and the following objections to the following questions:

“Q. (By Mr. Strong): Where did you get the information which is inserted here: Miscellaneous Enterprises. Where did you get that information?

A. From the attorney, Mr. Mirman.

Mr. Robnett: I move to strike the answer, if the Court please, upon the ground that it is not binding upon this defendant, and would be hearsay.

The Court: Overruled. Motion denied.

Mr. Katz: If the Court please, I interpose the objection, and move to strike upon the ground that it is a privileged communication. The signing of a document disclosing the information contained therein, does not waive the privilege of the source from which the information was obtained.

Mr. Robnett: I would like to join in that.

The Court: Motion denied.

Q. (By Mr. Strong): I show you this item here on the front page, item 12 on the return says, ‘other income, state nature of income,’ and then the words, ‘miscellaneous income, \$71,388.84.’ Where did you get that information?

Mr. Robnett: Object to that as having been asked and answered.

Mr. Strong: No, that wasn’t the same question, your Honor.

Mr. Robnett: He asked him about the item under miscellaneous income.

Mr. Strong: No, I asked about miscellaneous enterprises, which is another line on top.

Mr. Robnett: Same objection to this question as interposed to the other." [R. Vol. III, pp. 1126-1127; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 40.

The Court erred in overruling the following objections to the following questions:

"Q. (By Mr. Strong): Mr. Witness, as to these sums that are shown here of 50 per cent, \$35,694.42 to Sam Ormont, 50 per cent for \$35,694.42 to Phillip Himmelfarb, did you see any records with reference to those sums?

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial, also that it is privileged.

The Court: The question calls for a yes or no answer, and in view of that the objection is overruled.

The Witness: Well, yes.

Q. (By Mr. Strong): Did you see regular books and records? A. No, sir.

Mr. Robnett: Object to that as asking for an opinion of the witness.

The Court: Objection sustained.

Q. (By Mr. Strong): What did you see? A. A slip of paper on which was written—

Mr. Robnett: I object to that, if the Court please, on the ground that it is privileged and incompetent, irrelevant and immaterial, also leading and suggestive.

The Court: There is no foundation laid as to when he saw it, who was present, and so forth.

Q. (By Mr. Strong): When did you see it?

Mr. Robnett: I object to that.

The Court: He said he saw a piece of paper.

Mr. Robnett: I know. I object to this question as immaterial." [R. Vol. III, pp. 1130-1131; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 43.

The Court erred in permitting witness BIRCHER to testify concerning Exhibit 42 and concerning the safe deposit box and the making of a list of the contents thereof and as to the statements of Mr. ORMONT on May 25, 1945, being the same incident testified to by Mr. MALIN over objection and which is hereinbefore assigned as Error No. 31, wherein the objection is set out and to which reference is hereby made.

The substance of the witness' testimony was that Mr. ORMONT opened the safe deposit box and the witness asked Mr. MALIN to take out his work papers and copy in their presence so that they could watch him as each document was taken out of the box by either Mr. ORMONT or by the witness and that Mr. MALIN made a list as the bonds were taken out. Mr. ORMONT stated he had purchased most of the bonds, although they were recorded in his name jointly with the name of his mother, MRS. DORA GOLDBERG. He had purchased them mainly from funds from extra charges he had collected on the side which were not recorded in the books. Some of them he had purchased in earlier years with some of his savings. He noticed that one of the bonds was recorded in his name alone and not in the name of his mother and he jointly, and he asked whether it was possible for him to get it corrected so that it could be in their names jointly; although *it* was his funds, he wanted it in the two names. Said that Mr. ORMONT came over to the witness and apologized repeatedly. This answer was struck out on motion and the witness was told by Mr. STRONG not to go into the apology at all, but notwithstanding that he again stated that Mr. ORMONT said he wished to apologize for his actions the day before in having taken the affidavit

from me forcefully and doing away with it, *and asked what could be done to straighten out the situation.* The witness told him the things to do was to produce the affidavit and defendant said he couldn't. The defendant told him, "Mr. Bircher, as proof of my patriotism, I want you to know that all this extra money I got on the side I put in war bonds."

The Court also erred in denying the motion to strike said testimony where Mr. Robnett called the Court's attention to the transcript of the record and quoted certain testimony of Mr. BIRCHER with regard to what he told the defendant regarding the affidavit, and then made the following motion:

"I now, at this time, move to strike all of the testimony of the witness Bircher, as to conversations and transactions that happened after that incident he just testified to, on the ground that thereafter anything that the defendant said or did was of necessity, said and done under threat, and not voluntary, because here he was under a threat, that he had better not do this, he was destroying Government property; it was very serious, and that they would go into that matter further at a later date. And I think it is a sufficient showing to show that the defendant thereafter would be under fear as to anything he might say or do. * * *

* * * * *

"That is my motion, to strike all of that evidence that follows that, the conversation, and all things that happened with regard to his showing them the bonds, letting them take a list of the bonds, and also as to any furnishing of books or records thereafter, on the ground that that was and still is a threat."
[R. Vol. III, pp. 1156-1158.]

Specification of Error No. 14.

The prosecuting attorney was guilty of misconduct during the examination of witness ERNEST LINK, in repeatedly eliciting from said witness prejudicial statements, after motions to strike had been made and granted, which statements were to the effect that appellant was doing a shady business and for that reason the witness did not want to continue to work for him; and the Court was guilty of misconduct in failing to promptly grant the motions to strike and in failing to instruct the prosecuting attorney to desist from further pursuing said questions and discussion between the Court and prosecuting attorney [R. Vol. I, pp. 441-446].

Specification of Error No. 15.

The prosecuting attorney was guilty of misconduct in the redict examination of Government witness ERNEST LINK, wherein the witness had made an explanation of certain checks in payment of differences on the purchase of cattle and changes which the witness had made and on the records and which the defendant had made on the original bills, so as to avoid the loss of the subsidy payments, and motion was immediately made to strike the answer and thereupon the following transpired:

“Mr. Strong: It proves that the records are false.

The Court: Government counsel’s statement to the jury will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel.” [R. Vol. II, p. 504.]

Specification of Error No. 53.

The U. S. Deputy District Attorney was guilty of misconduct in his closing argument to the jury, in the following particulars:

“* * * And you will remember the cross-examination, three or four days of it, testing every iota of statement that was made by Mr. Eustice, testing him right and left, trying Mr. Eustice, did he remember or didn't he remember, where did he get it, where didn't he get it, asking hypothetical questions, if this was the fact—*nothing in the record to show that it is the fact*—but if such-and-such is the fact then you subtracted that from this, and you added this to that, what would you have? * * * *There is nothing to show that they did exist, nothing to show that any of these supposition questions are based upon anything than what they purport to be, if and assume.*

“* * * That is all on suppositions, on assumptions—*nothing in the record to show that it happened.*

“You will remember that after all that questioning and all of these checks that we used to ask him, what about this check, what about that check, did you subtract this one and did you add this one, if you did that what would you have? You will remember I took all those checks and I took each one and I said to Mr. Eustice, I said, ‘Now take this check, did you include that amount in the sum which you say is unreported income?’ He said, ‘No, sir.’ (Italics supplied. [R. Vol. IV, pp. 1456-1457.]

* * * * *

“And we went down the line, and my recollection is that there wasn't a single check upon which he

had been cross-examined or questioned, *not a single check, that he included as part of the unreported income.*

“Well, if those checks aren’t included as part of the unreported income, what have they to do with this case? You might just as well bring in my checks too and ask him if he deducted those sums what would he have. *It has nothing to do with this case, absolutely nothing.*

“Every single check—and you can examine these checks—some \$6000 in this sum, piles of them, all marked by the defendant and all put before Mr. Eustice and cross-examined, if and maybe and assume, *but not a single one of those checks was taken as part of the unreported income.* And if that is true then there is nothing to worry about those checks, no reason to deduct those checks from the unreported income. *He didn’t take them in. They had nothing to do with the figure which he says is shown to have been the additional sum of money which was furnished by Mr. Ormont and which was not reported.*

“And then we had this business of cross-examination of applications for war savings bonds. Any connection between the applications that were put up by defense counsel concerning which he questioned Mr. Eustice and any of the particular bonds that Mr. Eustice took in as income bought with unreported income? *No connection shown, just an application.* * * *

“Checks, figures, \$1322.27. ‘Add up these figures,’ I asked Mr. Eustice. ‘Were any of those sums taken in by you as unreported income?’ He said, ‘No, sir.’ It has nothing to do with this case at all. More checks—more checks. [R. Vol. IV, pp. 1458-1459.]

"I ask you if those aren't some of the extra pieces in the box. We are dealing with a jigsaw puzzle, with certain evidence. I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. *Very confusing, no doubt about it,* and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get to the final picture. *You will have so many piece that have nothing to do with it that you may give up.* But I say to you, ladies and gentlemen, that the evidence which shows what was the unreported income is so clear and convincing and completely undisputed, completely undisputed, that there isn't any doubt as to the unreported income and there isn't even any substantial doubt as to what the sum is.

"Now what did Mr. Eustice tell you specifically? The year 1944—I am only going to deal with 1944—he told you how much the original return reported, a sum which was shown as salary, some \$4500. Mr. Eustice said that he found *about \$27,000 more than Mr. Ormont had earned and hadn't reported. Rents shown, various other deductions and items shown, unreported. What was the difference?* The difference was between the amount reported, some \$9,000, and the correct amount, some \$36,000.

"*I ask you, is that difference substantial?* Is that a sum that one overlooks in his computations as you might small expenditures for hairpins or something? Is that something that one doesn't take into account or is that something that someone wilfully and deliberately conceals for the purpose of defeating and evading the payment of a substantial part of his tax?

"And as to these figures which are in the record—they might not be precise but your memory is much

better than mine, I am sure—Mr. Eustice told you where he got those figures. He told you how he got them. He told you what he based them on. And there isn't any contradiction as to the figures.

"Yes, there is an attempt to confuse, there is an attempt to drag something else in, but as to the figures as to which he testified, they are all in there. There were one or two items which *Mr. Eustice took in as income which might or might not be income, which might be repayment of a loan or something.* I don't remember what the items were, but I don't think that they exceeded \$2000. I don't think they even reached \$1000. But the difference between \$1000 which he may have taken in which he shouldn't have—I don't say he did, but if he did—the difference that and the \$26,000 or \$27,000 additional, that is immaterial. *That is just a drop in the bucket.* That is another extra piece to take your attention off the main figure. (Italics supplied.) [R. Vol. III, p. 1460.]

"I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts *shown on the books and records of the Acme Meat Company* and the amounts shown upon the bank records that are undenied and undisputed as of this amount, and *that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.*

"Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—this thing *went on for so long that after while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on.* And that is another thing to consider, as I told you, because this

case deals with concealment of money, failure to report money and an attempt to defeat and evade a tax. You take into account what goes on with reference to all disclosures and everything. Are you getting complete information, or have you got just the information that Mr. Eustice put in, *undenied, undisputed and corroborated?* I will show you how. (Italics supplied.)

"Mr. Link testified. * * * But the important thing is that he testified to, and the important thing that counts in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, *is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.* (Italics supplied.)

* * * * *

"And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books because, as he told you, he had never been given those invoices. And what did those invoices show, ladies and gentlemen? Those invoices showed on their face—and they are part of the exhibits; *you can examine them*—but they showed on their face that the money shown on them was paid, the date it was paid, and it had Mr. Ormont's signature. *That is some more money that isn't on the books, some more money unreported,* some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont. (Italics supplied.) [R. Vol. IV, pp. 1461-1462.]

* * * * *

“The exhibits prepared and signed by the defendant himself, the defendant Ormont, if you will examine them will, on their face, tell you the whole picture, even if Mr. Eustice were not giving testimony about them; if all you had were the exhibits 51 A, B, C and D; if all you had were the income tax return for 1944; if all you had was the income tax return which shows how much money was earned in that period; those documents alone tell you what the *additional income was*. (Italics supplied.) [R. Vol. IV, p. 1468.]

* * * * *

“* * * But even in the return which he filed on *that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money.* * * * (Italics supplied.)

* * * * *

“Any deductions? *You know, you have deductions when you earn money;* * * * (Italics supplied.) [R. Vol. IV, p. 1471.]

* * * * *

“* * * They disclosed at that time what that money was, and, *if everything was above board, clean, honest, and not a violation of law*, why didn't they put it on the return? Why did they have these hieroglyphics. Miscellaneous income \$71,000.00. No explanation; nothing. * * * (Italics supplied.) [R. Vol. IV, pp. 1473-1474.]

* * * * *

“And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in 1943 out of the \$12,000 he bought about \$8000 worth of bonds. You remember that testimony, \$8000 worth

of bonds. That I assume is intended to show, or at least you are supposed to draw the inference from that, that the unreported income which Mr. Eustice claims this man accumulated during that year wasn't really accumulated during that year because he bought \$8000 worth of bonds.

"Take the \$8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find over \$50,000 worth of bonds bought that year—\$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the schedule and it is in evidence.

"What is \$8000 off of that? It is \$42,000. Well, let's assume he had \$8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know. [R. Vol. IV, pp. 1476-1477.]

* * * * *

"* * * And besides that Mr. Malin himself, with information *which he told you he got from the defendant Ormont*, prepared net worth statements too. * * * (*Italics supplied.*) [R. Vol. IV, p. 1478.]

* * * * *

"* * * His Honor will tell you that if we do not prove the whole figure, if we prove substantially the figure, *if we prove a substantial amount of money, it is just as good as proving the whole figure.* In other words, you don't have to hold the government

to proving precisely that sum of money which is stated in the indictment. Substantially that is enough. And the amount of money shown on that little slip of paper which I have shown you, which is Government's *Exhibit 53*, as well as the amount of money which is shown upon these documents which were filed by Mr. Ormont and the accountant, *that is practically the same as the amount shown in the indictment under count 1*. So there isn't any problem as to any variance between the amount shown and the amount that we have established. * * * (Italics supplied.)

* * * And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—*just forget all about these things that were dragged in and that have nothing to do with this case*, and what does this case consist of? * * * (Italics supplied.) [R. Vol. IV, pp. 1480-1481.]

* * * * *
* * * If you want to forget everything that Mr. Eustice said and if you just look at that fiscal year return, which shows \$71,000 miscellaneous income for the year beginning May 1, 1944, and ending on April 30, 1945, and *just take 8/12 of that amount, and you will find out how much he earned that year in addition to what he reported. You don't have to look at the books, you don't have to listen to Mr. Eustice, you don't have to listen to anybody. They show it themselves on their returns.* (Italics supplied.) [R. Vol. IV, p. 1549.]

* * * * *
* * * just because the defendant said to them he only earned \$11,000, that doesn't mean that he

only earned \$11,000 extra that year. All that means is that that is all he told them, but he may have earned more, and the income tax return, the fiscal year return, if you take 8/12 of that you will find that it is closer to \$22,000 and not \$11,000.

“But even if it is \$11,000; let us take \$11,000, which he admitted he earned in 1944. *That’s enough.* We don’t have to prove the precise figure. We just have to show *a substantial amount.*

* * * * *

“* * * Do you think anybody who reports income, as Mr. Ormont did, for the year 1944, of \$12,000, and leaves off \$11,000, is not filing a false return? He is reporting only half, according to his story, and only one-third the amount we say was not reported. (*Italics supplied.*) [R. Vol. IV, pp. 1551-1552.]

* * * * *

“* * * *The books speak for themselves. That is why they were admitted in evidence. If they weren’t in evidence they wouldn’t be in this case.* (*Italics supplied.*)

* * * * *

“* * * Why didn’t *they* put Mr. Malin on the stand to tell you about it then? He is just as accessible *to them* as he is to me. And if it is their defense, it is their *witness*. They didn’t put Mr. Moody on, they didn’t put Mr. Malin on.” (*Italics supplied.*) [R. Vol. IV, pp. 1560-1561.]

Nos. 11662-11666

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11662

PHILIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 11666

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

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APPELLEE'S BRIEF.

Jurisdiction.

Appellants were indicted under the Internal Revenue Act of 1942 (26 U. S. C. A. 145(b)). The District Court had jurisdiction under Sections 24 and 340 of the Judicial Code (28 U. S. C. 41(2) and 18 U. S. C. 546) and the Internal Revenue Code (26 U. S. C. A. 145(b)). The offenses charged were committed in the Southern District

of California [R. 2 ff.].¹ Judgments were entered on June 16, 1947 [R. 137-140]. Notices of appeal were filed on June 24, 1947 [R. 205-208].²

This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A. 225).

Statute Involved.

The Internal Revenue Code (26 U. S. C. A. §145(b)) provides as follows:

“Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.”

¹The references preceded by “R” are to the printed record on appeal; those preceded by “O. A. B.” are to appellant Ormont’s opening brief before this Court, and those preceded by “H. A. B.” are to appellant Himmelfarb’s opening brief.

²Appellants, although named jointly in one indictment and in each count of the indictment, and tried jointly in a single trial, presented separate appeals, with separate briefs, to this Court. The Government has no objection to this procedure here by appellants; nevertheless, with the permission of this Court, the Government will continue to treat the two appeals as one matter, and will present only this one brief in reply.

Statement of the Case.

Appellants were indicted on January 22, 1947, in the United States District Court for the Southern District of California, in four counts. Count One charged that appellants Ormont and Himmelfarb attempted to defeat and evade Federal income tax owed by appellant Ormont for the calendar year 1944 by filing a false return understating Ormont's net income and income tax for that year [R. 2-3]. Count Two contained similar charges against both appellants in connection with appellant Himmelfarb's return and income and tax for 1944 [R. 3-4]. Counts Three and Four contained similar charges against appellant Ormont alone, as to his return and for 1943 and 1942, respectively [R. 4-6].

Appellants' motions to dismiss the Indictment [R. 6-41] and their motion for bills of particulars [R. 42-71], were denied, after hearing, on March 12, 1947 [R. 73-76] except that the motion for particulars was granted in certain respects [R. 75-76], and those particulars were subsequently furnished by the Government to appellants [R. 76-78].

On March 28, 1947, appellants each pleaded not guilty to each of the counts in which they were charged [R. 79].

On May 2, 1947, the Government's motion [R. 80ff] to consolidate for trial the within income tax evasion case together with another case pending before the District Court against the same defendants charging violations of the Emergency Price Control Act [R. 151-203], was denied [R. 85].

Thereafter a jury trial was had in the District Court from May 23 to June 13, 1947, inclusive [R. 302ff].³ One June 13, 1947, the jury found Ormont guilty upon Count One of the Indictment, and Himmelfarb guilty on Count Two [R. 133], the trial court having previously dismissed Counts Two, Three and Four of the Indictment as to Ormont, and Count One as to Himmelfarb.

After denying motions for acquittal and for a new trial [R. 134-136], the trial judge, on June 16, 1947, sentenced each of the appellants to imprisonment for a term of one (1) years and one (1) day [R. 136-140].

Statement of Facts.

We state below the facts most favorable to the Government. These differ to a considerable degree from the purported "facts" which appellants in their separate briefs (O. A. B. 1ff; H. A. B. 5ff) bring before this Court.⁴ The facts upon which the Government relies, are these:^{4a}

³Appellants at no time made any motion for separate trials upon the income tax charges.

⁴Appellants, in placing in their briefs conflicting testimony and evidentiary matters, selected excerpts favorable to themselves, argumentative matters, and material going to the credibility of witnesses, have disregarded the controlling rule that upon appeal from a judgment in a criminal case, only the facts most favorable to the Government will be considered by the appellate court in its determination of the sufficiency of the evidence. *Hemphill v. United States*, 120 F. (2d) 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627. Appellants have also placed in the record before this Court in these cases, more than 150 pages of matters which occurred in the case brought against them under the Emergency Price Control Act [R. 80-86, 141-203, 214-301], and which have nothing to do with the instant appeals, as we show more fully below.

^{4a}We are omitting from this recital of facts such facts as pertained exclusively to counts which were dismissed in their entirety by the court below.

On or about the 15th day of March, 1945, Ormont filed in the Office of the Collector of Internal Revenue at Los Angeles, California, a Federal income tax return [Gov. Ex. 3] on which he declared, under penalties of perjury, that his gross income for the year ending December 31, 1944, was \$12,674.75, his net income for income tax purposes was \$12,174.57, and the tax due on it was \$3,626.58 [R. 320-321, 339, 341, 342, 344-345].⁵ Ormont also paid the entire tax thus reported by him [R. 362]. Ormont's true gross income for that year, as shown by facts discussed in considerable detail below, was \$37,482.52, his net income tax income was \$36,982.52, and his true tax due on it was \$18,143.12.

On or about March 14, 1945, Himmelfarb filed a Federal income tax return [Gov. Ex. 4], showing his gross income for the same period as \$4,611.74, his net income for income tax purposes was \$4,111.74, and his income tax as \$656 [R. 341, 342, 344-345].^{5a} Himmelfarb's true gross income for that year was \$18,252.65, his net income for income tax purposes was \$17,752.65, and the correct tax due was \$5,843.91 as shown below.

On May 18, 1945, the Federal Bureau of Internal Revenue made known to appellants the fact that their income tax returns for the calendar years 1942 to 1944, inclusive, were under investigation, by requesting permission to examine appellants' books and records. Appellants thereupon immediately sought the advice of an attorney and an accountant, and upon their advice filed jointly, on

⁵The returns, in evidence, were transmitted in their original form, as were all other exhibits in this case, to this Court [R. 209-210].

^{5a}This return was on a community property basis. Himmelfarb's wife filed a separate return.

May 24, 1945, a Partnership Return of Income showing additional, previously unreported income, for the period from May 1, 1944 to April 30, 1945, in the sum of \$71,388.84 [R. 383, 1091ff; Gov. Ex. 6].⁶

Between 1931 and 1944 Ormont operated a wholesale meat business alone and with others, under the fictitious name of Acme Meat Company, at 3301 E. Vernon Avenue, Vernon, California. From at least May 1, 1944, and through April 30, 1945, Ormont and Himmelfarb operated the Acme Meat Company as partners [R. 913, 925, 926, 928. See also, R. 432, 944, 1035-1036; Gov. Ex. 44]. This business was conducted, and a regular set of books was kept, on a calendar year basis [R. 395-405, 450, 457-460].⁷

⁶For the convenience of this Court, we have prepared the table below from the evidence in the case:

ORMONT

	<i>1944 Return</i>	<i>True Figures</i>
Gross income	\$12,674.57	\$37,482.52
Allowable deductions	500.00	500.00
Net income	12,174.57	36,982.52
Income Tax	3,626.58	18,143.12

HIMMELFARB

	<i>1944 Return</i>	<i>True Figures</i>
Gross income	\$ 4,611.74	\$18,252.65
Allowable deductions	500.00	500.00
Net income	4,111.74	17,752.65
Income Tax	656.00	5,843.91

⁷Most of the evidence in the record related to the joint operations of both Ormont and Himmelfarb insofar as their 1944 earnings were concerned. The trial judge carefully limited the evidence as it was introduced into the record to the appellant to whom it applied. We shall relate in general form what the facts in that respect show on an over-all basis, and then point out specifically what facts are applicable to each of the appellants separately.

Income from sales of meat, made by each of the appellants [R. 429-435], within the ceiling prices set by the Office of Price Administration during the period of price control on meat, which included the period material here, was usually reported on invoices and recorded on these books [R. *id.*]. And the figures on the 1944 income tax returns upon which this case is based, were based by appellants upon these ceiling, recorded prices.

In addition to that income, each of the appellants received as income from the sale of meat certain "bonus" or "overceiling" payments, which consisted of additional cash sums of money, paid by appellants' regular meat customers in connection with their purchases of meat from the Acme Meat Company, in addition to the legal ceiling prices reported on appellants' books [R. 427-428].

These additional "bonus" payments were not recorded on appellants' books [R. 435]. nor were such sums reported by either appellant as part of his income for income tax purposes for the calendar year 1944 upon his income tax return for 1944 [Gov. Exs. 50 and 51].

In addition, certain sales and income from them in some instances were shown on invoices, but the invoices were not transmitted to the Acme Meat Company's bookkeeper by appellants, and as a result were not entered on its books, nor was that income included as part of the gross or net income for 1944 reported by appellants for income tax purposes on their calendar year returns [R. 414ff].

These additional, unreported "bonus" receipts were recorded, in part at least, upon sheets of paper by both of the appellants, and these lists were kept by them in a desk drawer at the plant [R. 429, 433-435].

Appellant Ormont also deliberately falsified his business financial records in other important respects for other purposes [R. 401-409, 448-450, 470-471, 472, 483, 487]; caused to be falsified on the books the distribution of the net income or profits as between Ormont and Himmelfarb for 1944 [R. 436, 438-440]; and later drew various checks to cover-up his original falsification [R. 504 See also R. 471-490], and he caused to be falsely shown on the books the appellant Himmelfarb as an employee, rather than as was the fact, as a partner [R. 873-888], for purposes of obtaining certain governmental subsidies or allowances to which appellants would not otherwise be entitled [R. 438-440].

While Ormont's 1944 income tax return was being prepared for him by his bookkeeper from the books of the Acme Meat Company, the bookkeeper held conferences with Ormont as to facts concerning Ormont's total income, and obtained certain factual material furnished by Ormont in that connection [R. 421-425, 465-468]. In response to the bookkeeper's inquiry to Ormont as to whether the Acme books showed the total of Ormont's income for 1944, Ormont gave the bookkeeper certain additional figures of income from bonds [R. 424-425]. Ormont however did not disclose at that time the sum of more than \$71,000 later reported by Ormont and Himmelfarb as income in the partnership return (see *infra*).

The bookkeeper later reported other of Ormont's activities to Government officials [R. 498-499].

Agents of the Bureau of Internal Revenue, as stated before, conducted an investigation into the income tax returns and the income of each of the appellants for the years 1942, 1943 and 1944 [R. 507-600, 873-888, 913-

1014, 1017-1053]. The agents, in conducting their official investigations, examined, and the Government later introduced in evidence at the trial below, appellants' individual income tax returns for those years; a so-called "partnership return" on which appellants had declared more than \$71,000 additional income; bank records and all bank documents pertaining to accounts of each appellant, of which the agents made transcripts, carried at various banks by each of the appellants under their own names and as the Acme Meat Company; records of dealings by Ormont with a stock brokerage firm; records of other concerns and individuals who had dealt with appellants; invoices; cancelled checks; transcripts of portions of the books and records of the Acme Meat Company; invoice lists of appellants' personal property; bonds and records of bonds; and other items [R. *passim*].

After the Government agents had begun their investigation, appellants submitted various documents and statements to the agents respecting appellants' 1944 income. These included a net-worth statement for each of the appellants, letters, affidavits and statements of balances [Gov. Exs. 50A-D, 51A-D].^{7a} The Government agents held numerous conferences concerning these matters with appellants [R. 584, 1023-1025], who furnished the agents with much additional information as to appellants' income, as is disclosed more fully below.

^{7a}All of these have been reproduced in the Appendix to this brief for the Court's convenience.

During some of these conversations, Ormont apparently lied to the agents respecting his income in 1944 [R. 1025-1027], and he also sought to confuse the agents in that regard [R. *ibid*].⁸

On May 24, 1945, Ormont and Himmelfarb filed a joint partnership return, showing additional and previously unreported income of more than \$71,000 for the period from May 1, 1944, to April 30, 1945 [see Appendix hereto; R. 1038; Gov. Ex. 6].

On May 24, 1945, during the investigation, appellant Ormont, having been warned of his constitutional rights by the agents [R. 1030, 1035, 1043, 1136-1137], informed them that he wanted to tell the truth concerning his income for 1944, that "the thing had been bothering" him and he wanted to "get it off" his "mind so that" he "could go around and look people in the face again" [R. 1031, 1173].

The overcharges collected by appellants were not uniform and fluctuated [R. 1039, 1180, 1181]. Ormont declined to disclose the names of any customers [R. 1039].

Ormont admitted that this income was not reported on his individual Federal income tax 1944 return [R. 1175].

The agents told Ormont that they wanted to discuss his income tax liability and income tax affairs with him, that

⁸At the trial, the agents testified in detail as to specific facts and figures disclosed by their investigations and audits, based in great part upon the documentary exhibits in evidence [R. 522 ff]. Appellants did not at any time produce at the trial their books and records, although they repeatedly sought to keep out secondary evidence as to those documents. The agents were cross-examined in minute detail at very great length as to these items and other alleged facts placed before them by appellants' counsel [R. 601-873, 1055-].

he had the right to be accompanied by an attorney, and have the counsel of an attorney, if he desired; that he was not required to give any testimony; and that any statements he made or documents he produced might be used in court against him in some matter at some future time. Ormont asked specifically whether any statements he made to them might become available to other Government agencies, and he was told that normally any information given the Internal Revenue Department would be held in confidence by that department, but that if a criminal trial should follow, such information might be disclosed at any such trial. Ormont then said that he did not care to have an attorney present, that he did not think he needed one in order to tell the truth, that he did not want to have any trouble; that he wanted to pay whatever was due the Government [R. 1136-1137]. (See, *e. g.*, *Heller v. United States*, 57 F. (2d) 627 (C. C. A. 7), cert. den. 286 U. S. 567; *Viereck v. United States*, 139 F. (2d) 847 (App. D. C.), cert. den. 321 U. S. 794; *Shubin v. United States*, F. (2) (C. C. A. 9).)

Ormont then stated that he had made quite a large sum of money [R. 1137].⁹

Ormont stated that he and Himmelfarb had had an indefinite business arrangement which was somewhat similar to a partnership or joint venture business, but that he did not want it commonly known that they had such an arrangement because of fear that some other Government agency might cause him embarrassment; he said that he had been receiving certain subsidy benefits, to which another Government agency might challenge his

⁹As to the facts relating to the May 24 statement and events, see also R. 1035-1046, 1072-1078.

right since he had represented to other agencies that he was doing business as an individual or sole proprietor, whereas in fact he and Himmelfarb had an arrangement which began on May 1, 1944, whereby they would share equally from the "legitimate" profits of the Acme Meat Company, wholesalers and packers of meat [R. 1137-1138].

Ormont's answer to the inquiry whether he and Himmelfarb was partners, was evasive and qualified [R. 1067]. He said he preferred the association to be known as something other than a partnership "because of the jeopardy it would place" him in as to his slaughtering license and "subsidy to the R. F. C." (Reconstruction Finance Corporation) for the reason that appellants had represented Himmelfarb as an employee [R. 1068].

Ormont said he and Himmelfarb shared equally in such "legitimate" profits as to the first \$24,000 and that any legitimate profits above that sum belonged to him [R. 1139].

Ormont next disclosed that he had other profits resulting from "bonuses" or overcharges received from customers. He said he preferred to call such overcharges "bonuses" or gifts because of the fact that he might get into difficulty with other governmental agencies [R. 1138].

Ormont then revealed that these "bonuses" totalled more than \$71,000.00 for the period from May 1, 1944 to April 30, 1945 [R. 1138].

Ormont admitted that no books or records were kept as to these side profits or "bonuses" received from the customers of the Acme Meat Company [R. 1138]. He stated that these side charges or "bonuses" from the cus-

tomers of the Acme Meat Company had not been uniform, that these overcharges or excess charges fluctuated and were determined by how much the customers were willing to pay "on the side" [R. 1138].

Ormont then stated that he did not want it known that they had gotten those overcharges, for fear of cancellation of the license of the Acme Meat Company to do business as a packing house or as a wholesaler; that, he said, was his principal concern. Ormont said that he wanted to pay whatever taxes he owed, which he and Himmelfarb, his associate, had not reported in their 1944 individual returns [R. 1139].

Ormont was then asked whether he had a record of such unrecorded profits, whereupon he produced a small memorandum book in which he had a few figures recorded showing, according to Ormont, the net profits from the unrecorded overcharges for the period from May 1, 1944 to January 5, 1945, and also the total profits or bonus collections for the period from January 5, 1945, to April 30, 1945 [R. 1139; Gov. Ex. 53. See Appendix hereto].

These figures totaled about \$35,000 received by Ormont personally, about \$11,000 of which was recorded as having been earned from the secret and unrecorded charges or bonuses from May 1, 1944, to January 5, 1945, and the balance, some \$23,000, was recorded as having been earned from excess charges and unrecorded charges or cash collections or bonuses from customers during the period January 5, 1945, to April 30, 1945 [R. 1139].

Ormont said that he had talked with Himmelfarb regarding their dilemma and worry about having gotten these secret charges on the side, and he said that he

wanted to do whatever he could to straighten the matter out, to pay up quickly, that he wanted to be able to walk around and look people in the face again, that he had worried a lot about the matter [R. 1140].

Ormont disclosed to the agents that he and Himmelfarb usually collected these excess or unrecorded charges in cash daily from their customers; that Himmelfarb made most of the collections from the meat customers at the same time they paid their regular bills; that in addition to these invoice bills he would collect varying unrecorded sums in cash on the side and the amounts would depend upon the fluctuating market, whatever the supply of meat would indicate [R. 1141].

Ormont revealed that he and Himmelfarb divided equally their profits every day, sometimes every three days, sometimes maybe three times a week; that they each kept a memorandum of the amount that they divided and that each time they made a division of these unrecorded cash profits, they added to that amount which they divided that day, the total of the amounts previously divided by them and that they kept only that running balance, with no other books or records of these extra charges which they collected [R. 1141].

Ormont also said that he had talked over with Himmelfarb the fact that neither one of them had reported this extra income on their individual 1944 returns, and that he felt that Himmelfarb would cooperate with the agents. The agents advised Ormont that they planned to interview Himmelfarb immediately [R. 1141].

Ormont was then asked whether it was agreeable to him if the agents prepared an affidavit for him to review and sign [R. 1141]. An affidavit was prepared in long-hand, and the agents went over each sentence with Or-

mont [R. 1141-1142], who was then sworn, signed the affidavit and left it with the agents [R. 1142].

In the Acme Meat Company's office, later that day, Ormont, Himmelfarb, one Special Agent, and two Deputy Collectors being present, Ormont stated that he wanted to see the affidavit he had signed. He was then holding in his hand a similar affidavit form which the agents had prepared for Himmelfarb to sign. Ormont said he wanted "to compare them," that he did not think they were the same, or consistent with one another. The agents thereupon let Ormont see the same affidavit he signed [R. 1145]. Thereupon Ormont began folding the two affidavits together. The Special Agent placed his hand firmly upon the affidavits and advised Ormont not to destroy them. Ormont then began to twist the affidavits and, "jumping like a wrestler" he bolted out the door, "down the bloody spillway" with the affidavits, which were not seen again by the agents [R. 1145-1146].

Himmelfarb was present throughout this incident [R. 1146].

The affidavit previously signed by Ormont and later destroyed by him stated that Ormont had received approximately \$35,000 extra income or "bonuses" which had not been reported on his individual or company books and records; that the portion of this income which he had received in 1944, he had not reported on his individual Federal 1944 income tax return [R. 1147-1148].

In connection with the investigation of their income, appellants hired a certified public accountant [R. 1091, 1093, 1101-1102]. The accountant prepared various documents on behalf of appellants, and, after the appellants signed some of them, the accountant sent them to the

Government agents conducting the investigation [See Appendix]. These documents contained factual data, which the accountant had obtained from appellants, and from their books and records and other sources of information which they furnished to him [R. 1120].

The accountant likewise prepared and filed the "Partnership Return," which each of the appellants signed [R. 1132, Gov. Ex. 6; see Appendix], reporting more than \$71,000 previously unreported income [R. 1125]. This return disclosed the division of this sum as going to "Sam Ormont, 50 per cent, \$35,694.42" and "Philip Himmelfarb, 50 per cent, \$35,694.42" [Gov. Ex. 6; R. 1127-1128]. The accountant had thus made the division upon instructions and based upon information furnished by the appellants [R. 1128].

On a later occasion, Ormont led the agents to his bank safe deposit box and showed them numerous bonds, which he admitted he had bought in part with the 1944 "overcharges" [R. 1150, 1190-1191].

Appellant Himmelfarb did not testify at the trial. He introduced character evidence [R. 1287-1293] and the testimony of an accountant, who in the main performed certain mathematical computations on behalf of Himmelfarb on the basis of the records in evidence [R. 1267-1286].

Ormont testified on his own behalf to a limited extent [R. 1297-1315], and introduced character and other evidence [R. 1329-1349].

SECTION A.

ARGUMENT AS TO APPELLANT ORMONT.

We shall discuss in this section the contentions made by appellant Ormont. In the next section of this brief, we do likewise as to Himmelfarb.

The brief presented by appellant Ormont on this appeal is difficult to answer briefly because of its unusual length and its unusual organization.

At the outset it should be noted that Ormont's brief places before this Court carefully selected excerpts from the evidence in the record, and does not bring forward the facts most favorable to the Government.

Ormont's brief also delineates in considerable detail every step taken on his behalf, devotes much space to re-statements of matter already in the record on appeal before this Court, presents 47 questions on appeal (O. A. B. 1-22), states in full 80 separate "specifications of error" (O. A. B. 22-87), repeats 21 of these specifications in an "Appendix" to the brief, and then argues only 37 of the total number (O. A. B. 88 ff.).

What appellant Ormont is apparently seeking to accomplish by his brief, is to obfuscate the true issues in the case and confuse this Court. In addition, Ormont in effect seeks to have this Court search through the entire record on appeal in an effort to find some error justifying reversal of the judgment below.

Without arguing, explaining or even stating his reasons for his contentions that prejudicial error exists in the multitudinous instances and incidents which he has simply thrown together in his brief, appellant recites page after page of matters occurring at the trial, bits of testimony, and excerpts from objections and rulings.

We do not think that this Court will require the Government to guess what legal basis for his objections in each of the hundreds of such items quoted by him appellant Ormont had in mind or wishes to have considered upon this appeal. And we do not believe that it is incumbent upon the Government to set up hundreds of legal straw men and knock them down in order to protect itself against reversal and preserve its rights in every possible respect.

We shall confine ourselves in this argument, therefore, to issues presented by Ormont on this appeal which are predicated upon some legal argument made by him in his brief.

Point I.

Appellant Ormont asserts (O. A. B. 88-93) that he was subjected to double jeopardy at the trial when after a dismissal of the jury which had been impanelled in this case, another jury was called and impanelled and the trial proceeded as to both Ormont and Himmelfarb before the second jury.

After the first jury had been impanelled, but before the trial had begun, attorney Katz, counsel for appellant Himmelfarb made a motion for a mistrial on the ground that some time during the selection of the jury and before it was impanelled some statement, to which he did not object at that time, had been made by Government counsel [R. 257-258]. As admitted by attorney Katz during his argument upon the motion for the mistrial, such a motion could not have been made by appellants at the time of the incident because the jurors had not then been impanelled [R. 258]. The court granted the motion, and it was stipulated by all counsel, including counsel for Ormont, that the jury

could be excused without being brought back to court [R. 260].

Counsel for Ormont was present throughout all proceedings, including the proceeding in which the motion to dismiss the jury was made and granted.

Furthermore at a preceding session in this case, the court, addressing counsel for both appellants, asked whether "in view of the fact that there are two defendants and each have separate counsel, may it be agreeable that any motions or objections or stipulations made by either defendant will be made on behalf of both defendants unless they are specifically disclaimed?" Both counsel, for Ormont and Himmelfarb, stated that this was satisfactory, and upon inquiry of the court as to whether they so stipulated, both counsel replied in the affirmative [R. 240].

Subsequently, two days later, counsel for appellant Ormont moved to dismiss the indictment as to him on the ground that he had been placed in jeopardy [R. 303]. Counsel for appellant Himmelfarb declined to join in the motion on his behalf [R. 303].

When the trial judge pointed out to Ormont that it was his understanding that the motion had been joined in by both defendants, counsel for Ormont admitted that he knew the court had "acted under that understanding"; that he purportedly did not intend to join in the motion for a mistrial, but admittedly "did not state anything to the contrary"; and then sought to limit the extent of his original stipulation under which motions and objections of one counsel for the defendants were deemed to have been joined in by both unless the contrary was expressly stated by the non-joining attorney [R. 303-4]. Counsel for appellant Himmelfarb, embarrassed by this clearly improper

manoeuvre, then stated that his understanding of the agreement as to motions and objections was that it applied to both defendants when made by either unless specifically rejected by one of them [R. 305]. Counsel for appellant Himmelfarb stated that the action in this respect of counsel for Ormont was such that he was "somewhat caught by surprise in so far as this motion is concerned" [R. 305].

The Government was not only similarly surprised by Ormont's counsel's action in that respect in the court below, but is frankly astounded at finding it being urged before this Court at this time. We submit that this Court should not now tolerate any attempt on the part of appellant Ormont to misuse a situation which was of his own creation, and which was properly handled by the court below. *E. g. Logan v. United States*, 12 Sup. Ct. 617; *Simmons v. United States*, 12 Sup. Ct. 171.

Moreover the mere impanellment of a jury without more does not constitute a placing in jeopardy of the type which precludes a further trial by another jury. See, *e. g. Lovato v. N. M.*, 37 Sup. Ct. 107; *Brady v. United States*, 24 F. (2d) 399 and cases cited; *People v. Bennett*, 114 Cal. 56.

Every act and statement at the trial and in the proceedings prior thereto was had and taken in the presence of both appellants. While appellant Ormont (O. A. B. 91-93) urges that his personal consent is required to every act of his counsel in court, and cites some state cases in support of that contention, he is clearly in error as to the law. For it is well settled that a defendant represented by his counsel at the trial is deemed to concur in the statements and acts of his counsel and that his counsel may act at all times on his behalf.

Point II.

Ormont complains that the Indictment is defective; that he was improperly denied the bill of particulars which he sought, and that his motion for a continuance was likewise denied (O. A. B. 94-97).

The indictment used in this case is a standard indictment which has been used in dozens of cases throughout the country, and has always been found sufficient. See, *e. g.* *United States v. Simmons*, 96 U. S. 360; *Rose v. United States*, 128 F. (2d) 622 (C. C. A. 10), cert. den. 317 U. S. 651; *Capone v. United States*, 56 F. (2d) 927 (C. C. A. 7), cert. den. 286 U. S. 553; *United States v. Skidmore*, 123 F. (2d) 604 (C. C. A. 7), cert. den. 315 U. S. 800; *Guzik v. United States*, 54 F. (2d) 618 (C. C. A. 7), cert. den. 285 U. S. 545; *O'Brien v. United States*, 51 F. (2d) 193 (C. C. A. 7), cert. den. 284 U. S. 673; *United States v. Muro*, 60 F. (2d) 58 (C. C. A. 2); *United States v. Clayton-Kennedy*, 2 Fed. Supp. 233 (Md.).

The cases cited by Ormont in support of his contention in this respect (O. A. B. 95), are of no aid to him.

While it is true that in Count One the return was described as an "income and victory tax return," it is clear that the words "victory tax" are mere surplusage. There was no "victory tax" for 1944, and no return for such a tax. Plainly Ormont was not and could not have been misled. The inclusion of the words "victory tax" in the count did not constitute reversible error and did not in any way effect Ormont's rights by their presence in that count.

Likewise without merit is appellant Ormont's objection to the denial of the court for a bill of particulars coextensive with Ormont's demand (O. A. B. 96). A bill of

particulars was granted [R. 76-77] and provided complete details as to the items which the Government was required to establish.

Any further disclosure in a bill of particulars of the type demanded by the appellants would constitute a disclosure of the Government's evidence. No error was committed by the action of the court below in this case since the granting of a bill of particulars is a matter of discretion with the trial court (see *e. g.*, the *Clayton-Kennedy*, *Skidmore*, and *Rose* cases, *supra*; also *Maxfield v. United States*, 152 F. (2d) 593 (C. C. A. 9); *United States v. Wexler*, 79 F. (2d) 526 (C. C. A. 2), cert. den. 297 U. S. 703; *United States v. Kushner*, 135 F. (2d) 668 (C. C. A. 2), cert. den. 320 U. S. 212.

There is likewise no merit to Ormont's contention that his motion for a continuance was improperly denied. Even a cursory examination of the record before this Court will disclose that appellants not only had ample opportunity to develop their case, but took full advantage of that opportunity in both their cross-examination of the Government's witnesses and the presentation of their case.

Point III.

Ormont asserts (O. A. B. 98-104) that the lower court improperly denied his "motion for immunity" and his "motion to suppress all evidence on the ground that he had obtained immunity previously" because of certain testimony given by Ormont before the Federal grand jury a long time before the instant case was returned, by another grand jury. The motion by Ormont was not to suppress just the evidence adduced before the grand jury—which, by the way, was not offered in the instant case—but to

suppress *all* the evidence in this case. The reasons for Ormont's motion to this effect are confusing.

The matter before the grand jury to which Ormont refers as conferring immunity upon him had nothing to do with the income tax prosecution in this case. It involved testimony on the part of Ormont with reference to certain overcharges which he was compelled to pay to the Southern California Meat Company and certain individuals in connection with his dealings with them in meat.

Nothing in the instant case relates to overpayments by Ormont to anyone else; in fact any overpayments which he made tend to reduce his true gross income which he is charged with in this case with having understated.

The case against appellants, involving overcharges on their part in violation of the Emergency Price Control Act, was nowise connected with the grand jury testimony to which appellant now refers. Nothing was asked Ormont before the grand jury which related to his overcharges; those alone constitute the basis of the so-called "O.P.A." case, not the instant case, against him in the District Court.

Plainly Ormont acquired no immunity from prosecution for an income tax evasion by having been asked to testify that he overpaid to someone else in another matter. In fact, Ormont denied before the grand jury that he made any overpayments, and asserted instead that the payments which he made were all legitimate charges.

The District Court examined the entire matter fully and concluded that "motions for immunity" and suppression of evidence were without merit. We submit that is still the case.

Point IV.

Appellant Ormont objects to the admission in evidence of the income tax returns which constitute the basis of the counts in the indictment (O. A. B. 104-111). Since he was convicted only upon Count One, his objection obviously falls as to the returns which related to the succeeding counts.

The basis of his objection to the admission of his return for the year 1944 is that the return was described in Count One as "income and victory tax return" whereas actually it was only an income tax return.

We have already pointed out above in connection with POINT II that the words "victory tax" constitute mere surplusage and did not in any way materially prejudice or effect Ormont's rights. The gist of the offense here is a wilful attempt to evade and defeat. The words "victory tax" were neither necessary nor descriptive of the charge, as Ormont appears to argue in his brief, and the cases cited by him in support of his contention in this respect are of no aid to him. See, *e. g.* *United States v. Simmons*, 96 U. S. 360; *United States v. Ragen*, 314 U. S. 513; *United States v. Schenck*, 126 F. (2d) 702 (C. C. A. 2); *Wiggins v. United States*, 64 F. (2d) 950 (C. C. A. 9), cert. den. 290 U. S. 657; *Gusik v. United States*, 54 F. (2d) 618 (C. C. A. 7), cert. den. 285 U. S. 545.

The Indictment in Count One clearly and fully sets forth the necessary facts sufficient to charge the offense involved, and the admission of Ormont's income tax return for the year 1944 was proper.

Point V.

The admission of certain invoices of the Acme Meat Company for the year 1942 is urged as error (O. A. B. 112-113).

Since Count Four, which involves Ormont's income for 1942, was dismissed by the court, Ormont's contention with respect to these invoices is clearly without merit. (See Point XII, *infra*.)

Point VI.

Ormont next objects to certain questions asked by the Government counsel upon redirect examination of one of the agents of the Bureau of Internal Revenue who examined the books of the Acme Meat Company, upon a subject which was developed extensively by Ormont's attorney upon cross-examination (O. A. B. 113-115). The ground for objection is not clear.

The control over the propriety of questions at the trial was wholly within the trial court's discretion, and unless prejudicial error can be demonstrated by appellant, his objection to the admissibility of testimony and other evidence is plainly without substance.

We see no ground for reversal in the objections raised.

Point VII.

Other testimony is objected to by Ormont (O. A. B. 115-117), also upon grounds not clear. At any rate, appellant Ormont believes that reversible error has been committed because a witness testified in some way at one point and the court originally overruled an objection, but later sustained it, and because the testimony admitted at the time the objection was overruled may have remained in the minds of the jurors.

In the light of the overwhelming evidence of guilt present in this case as to appellant Ormont, we do not believe that the particular incident referred to at this point constitutes reversible error.

Point VIII.

Ormont objects to the testimony regarding his statements at a conference on May 24, 1945 (O. A. B. 117-122, Appendix pp. 5-9). His objection seems to be predicated upon the contention that he was not fully warned of his constitutional rights at the time that he had his conversation with the Government agents on that date.

The record conclusively demonstrates [R. 1029, 1032, 1136] that Ormont was fully warned of his right against self-incrimination, and that his statements to the agents on that date were induced by a deliberate desire on his part to make known all of the facts with respect to his income. It should be noted that Ormont and Himmelfarb had few days previously consulted both an attorney and an accountant, having found out that they were being investigated by the Bureau of Internal Revenue, and Ormont had not only thereafter come to the office of the investigating agents for the purpose of making the disclosures, which are now objected to by him, but had also filed a partnership return on May 24, 1945, and had had prepared by his accountant other additional factual information which was submitted to the investigating agents (see Appendix hereto). See, also, *c. g. United States v. Sullivan*, 98 F. (2d) 79 (C. C. A. 2); *United States v. McCormick*, 67 F. (2d) 867 (C. C. A. 2), cert. den. 291 U. S. 662.

While we concede that the law relating to confessions and admissions requires that certain safeguards be present,

none of the statements of Ormont to the agents can be considered either a conversation or an admission, and consequently the cases which Ormont cites in connection with such conversations and admissions, are inapplicable. However, we submit, that on the basis of the record before this Court as to precisely what was said to Ormont by the agents before he made his disclosures to them, even a confession or admission would have been admissible in evidence had either been obtained from Ormont following the warning as to his rights given to him by the agents, and following his consultation with his attorney and accountant on the preceding days as to the procedure to be followed by him in this matter. See, *e. g.* *Wiggins* case, *supra*; *Benetti v. United States*, 97 F. (2d) 263 (C. C. A. 9); *Nicola v. United States*, 72 F. (2d) 780 (C. C. A. 3).

Point IX.

Ormont objects to the introduction of certain exhibits which he submitted voluntarily to the investigating agents, and to the testimony of his accountant who prepared those exhibits (O. A. B. 122-124). Since he voluntarily submitted the exhibits in question, he clearly has no cause to complain. There is no confidential relationship between an accountant and his client in this state; and none of the authorities cited by Ormont support him in this respect.

Moreover, the testimony of the accountant admitted in evidence related to the documents which he prepared at Ormont's request and sent to the agents, and which were admitted in evidence at the trial [R. 1109-1134].

Point X.

Next appellant Ormont objects to the denial of his motion to strike the testimony of a Government agent with reference to statements by Ormont to him subsequent to May 24, 1945, on the ground that on that date Ormont was "threatened with prosecution for destroying Government property" (O. A. B. 124-125).

This argument is particularly specious in view of the facts which we have related above, as to the incident which involved the discussion of affidavits by Ormont, which had previously been in the possession of the investigating agents. We submit that there is nothing in the record which supports Ormont's contention that he thereafter acted in fear and made statements involuntarily.

There is likewise no record basis for Ormont's present contention (O. A. B. 125) that he understood that the information he furnished to the Internal Revenue Agents would be kept confidential, and that he would be permitted to adjust his difficulties resulting from his failure to declare his true income by some payment of money. See, *e. g.* *Spies v. United States*, 317 U. S. 492; *United States v. Sullivan*, 98 F. (2d) 79 (C. C. A. 2); *United States v. McCormick*, 67 F. (2d) 860 (C. C. A. 2), cert. den. 291 U. S. 662; *United States v. Lustig*, 67 F. (2d) 306. This argument, as well as almost all others in this case, demonstrates the length to which appellant Ormont will go in attempting to obtain a reversal of the judgment below. In the face of the record against him, it is not surprising that he should make such attempts as this. However, they are clearly without merit.

Point XI.

Error is assigned in the denial by the trial court of Ormont's motion for acquittal on the ground of insufficiency of the evidence (O. A. B. 125-130).

It would serve no useful purpose to repeat here the evidence upon which the Government relies in support of the verdict and the judgment below. We have already delineated in considerable detail the facts most favorable to the Government, and we submit that they amply warrant the verdict of guilty with reference to the return for the year 1944.

In brief, however, it can be stated that the facts conclusively demonstrate that appellant Ormont deliberately and wilfully concealed from the Bureau of Internal Revenue a substantial part of his income for the year 1944 and paid no tax upon it as required of him by law.

Income from overcharges or bonus payments in the sale of meat, received by Ormont in his business during 1944, amounted to more than \$35,000, in addition to the sum which he reported as income on his return for 1944.

When confronted with an investigation of his income and return for that year, as well as preceding years, Ormont sought to further defeat the lawful process and his obligations by filing a partnership joint venture—fiscal year return.

The jury, which had the exclusive power of drawing the necessary inferences from the evidence before it and of determining the ultimate facts in the case, properly reached the conclusion that the fiscal year return did not truthfully represent Ormont's business relations, and that at least that part of the income which was earned between May 1, 1944 and December 31, of that year, and included

in that joint venture—fiscal year return, should have been included upon, and was wilfully omitted by Ormont from his calendar year return for 1944.

Upon the books and records in evidence, the testimony of the investigating agents, the documents prepared by Ormont's accountant and submitted to the agents, the partnership return, Ormont's original return, and all the other evidence in the case against Ormont, the jury below was fully justified in reaching the verdict that he was guilty as charged in Count One of the Indictment. See, *e. g. United States v. Johnson*, 319 U. S. 513; *Spies v. United States*, 317 U. S. 492; *Malone v. United States*, 94 F. (2d) 281 (C. C. A. 7), cert. den. 304 U. S. 502; *Gleckman v. United States*, 80 F. (2d) 394 (C. C. A. 8), cert. den. 297 U. S. 709; *United States v. Nuro*, 60 F. (2d) 58 (C. C. A. 2); *Oliver v. United States*, 54 F. (2d) 48 (C. C. A. 7), cert. den. 285 U. S. 540.

Point XII.

Ormont complains (O. A. B. 130-134) that the court below erred in denying his motion to strike testimony relating to the years 1942 and 1943. We disagree.

Obviously, if such testimony related only to those two years, its retention in the record could not be prejudicial to Ormont since he was acquitted on the charges relating to those years. On the other hand, evidence of Ormont's prior activities was relevant with relation to his wilfulness in failing to report his true income for 1944, and such evidence, containing as it does a basis for which

the jury could conclude that Ormont acted wilfully in failing to report his 1944 income, was clearly proper. See, *e. g.* *Ross, Skidmore, Oliver, Capone and Malone* cases *supra*; *United States v. Sullivan*, 274 U. S. 259; *Tinkoff v. United States*, 86 F. (2d) 868 (C. C. A. 7), cert. den. 301 U. S. 689.

Point XIII.

Ormont next complains (O. A. B. 135-142) that the Assistant United States Attorney prosecuting the case committed prejudicial misconduct in various ways.

First, Ormont objects to the examination of witness Link, although the court sustained the objections to the questions involved here. The court by its rulings fully protected the appellant in the trial below. Certainly no prejudicial error was committed by the exercise by the prosecutor of his right to ask questions of witnesses even though the testimony sought to be elicited was determined by the trial court not to be proper.

We agree with appellant Ormont that in certain situations, such as those referred to in the cases which he cites at this point in his brief, *where the situation warrants it*, the appellate court will order a reversal of a judgment upon finding the existence of reversible error in the record consisting of proscribed activities of the prosecutor. No such facts are present in this case. however, as an examination of the entire record will disclose.

Appellant then argues that the closing arguments of the prosecutor were of such a nature to require reversal (O. A. B. 136-142). In this respect Ormont has deliberately brought together various excerpts from the arguments and facts to imply that they were improper by giving to them meanings other than those intended by the prosecutor.

It would serve no useful purpose to discuss each of these instances separately. We respectfully suggest that this Court examine the argument in its entirety, and compare it with the evidence adduced at the trial. Such an examination will disclose that the argument of the Assistant United States Attorney in this case was proper, fully supported by the evidence, and fair to each of the appellants.

Point XIV.

Appellant asserts that the court erred in refusing to give to the jury certain instructions requested by him (O. A. B. 142-143, 149-150), and erred in giving certain other instructions (O. A. B. 143-148).

The court amply protected the appellants in its instructions to the jury and stated the applicable law in considerable detail [R. 1564-1591].

Neither of the instructions refused as to which complaint is now made, should have been given by the court, and that portion of the charge as made to which Ormont now objects, was clearly proper and fully warranted by the law and the facts in the case. See, *e. g.* *Miro*, *O'Brien*, *Oliver* and *Gusick* cases, *supra*.

Point XV.

Assignment of error is made with reference to the act of a deputy United States Marshal in coming into the court and serving a *subpoena duces tecum* upon appellant Ormont (O. A. B. 150-152).

Ormont seeks to make it appear that this was done deliberately. However, that is not true. As stated by the Assistant United States Attorney to the court upon the motion to quash the subpoena, he did not authorize that it be served in court, and he would not have permitted it to be so served had he known it was to have been done at that time [R. 806].

The service of the subpoena was brought about by the fact that the district court did not permit introduction of any evidence as to the contents of the books and records of the appellants, although they had been examined by the investigating agents who had made copies of details from them [R. 599-600]. These books and records, being the private papers of appellants, could not be obtained from them.

Upon offer of the secondary evidence, various objections were made by appellants [see *e. g.*, R. 598] as to such secondary evidence, on the ground that the books and records were of themselves the best evidence. The court excluded the secondary evidence on the ground that it was hearsay [R. 599]. When it was pointed out to the court that the books and records were not available to the Government (as appellants had them), the trial court replied "there are processes of the United States Government to use and you have the process of this court" [R. 600].

Following further discussion between the court and the prosecutor, the prosecutor sought to follow the expression

of the court, to demonstrate further to it that the books and records were unavailable as the private papers of the appellants and to lay a foundation for secondary evidence, and issued a subpoena calling for their production, as suggested apparently by the court [R. 808].

The subpoena was quashed, properly so; but the court nevertheless did not permit the use of secondary evidence of the contents of the books [see statements, R. 808-809]. See, *e. g.* *Lisansky v. United States*, 31 F. (2d) 846 (C. C. A.), cert. den. 279 U. S. 873; *McKnight v. United States*, 115 F. (2d) 972 (C. C. A. 6).

While the presence of the Deputy United States Marshal in the courtroom was unfortunate, in the light of the record before this Court as to the aggravated offenses committed by Ormont in the concealment of his true income and in his failure to pay the necessary tax, and in the light of all the facts which we have heretofore related with reference to his activities in that respect, we submit that this minor incident did not constitute prejudicial error requiring reversal of the judgment below.

Point XVI.

Appellant Ormont, without argument, calls upon this Court to examine for itself the balance of the Specifications of Error which he has set forth in his brief and to decide from that examination that the matters contained in them call for reversal of the judgment (O. A. B. 153).

Since appellant does not see fit to argue those matters, we see no point in discussing them in detail.

Suffice it to say that as to each of the unargued Specifications of Error there is no merit and that none of them should be entertained by this Court as a ground for reversal.

SECTION B.

ARGUMENT AS TO APPELLANT HIMMELFARB.

We shall discuss the points raised by Himmelfarb in his brief *seriatim*.

Point I.

Appellant Himmelfarb in his brief (H. A. B. 23, 30), examines certain bits of evidence selected by him and argues that such evidence falls short of the minimum necessary to sustain the judgment against him. Examination of the facts most favorable to the Government discloses not only that Himmelfarb is in error, but further that the facts respecting Himmelfarb are more than sufficient to support his judgment of conviction. The facts, stated more fully above, are, in substance, briefly these:¹

On March 15, 1945, Himmelfarb filed with the Collector of Internal Revenue at Los Angeles, an individual federal income tax return, on a community property basis [R. 874], for the calendar year 1944, declaring his gross income as \$4,611.74, his net taxable income as \$4,111.74, and his income tax as \$656 [*supra*, Gov. Ex. 4].

During 1944, Himmelfarb was, prior to May 1 of that year, employed by Ormont at the Acme Meat Company, a Government licensed meat wholesaler and packer, and after May 1, 1944, and until at least April 30, 1945, a partner of Ormont in that enterprise [*supra*, p. 6, Gov. Ex. 6, App. hereto]. Himmelfarb personally waited on

¹We shall, of course, refer only to those facts which the lower court admitted as against Himmelfarb.

the trade and sold meat to customers, made out invoices covering sales, collected extra or over payments in cash, and computed the weight multiplied by 3¢ and made entries on the list in the drawer [R. 429-431, 434-435].

During the investigation of Himmelfarb's and Ormont's returns, entries on books and records of the Acme Meat Company, the partnership entity, were discussed by an agent of the Bureau of Internal Revenue with Himmelfarb [R. 875-876, 879, 880, 882, 944-951], and the agent made a record of those entries [R. 875-878, 879, 882, 949-951, 967-969].

On May 23, 1945, one of the agents informed Himmelfarb that his 1944 return was being investigated [R. 885].

On May 24, 1945, Himmelfarb and Ormont filed a joint Partnership Return showing previously unreported taxable income of more than \$35,000 for each for the period from May 1, 1944, to April 30, 1945 [Gov. Ex. 6, App. hereto].

In about May 1944, Himmelfarb introduced Ormont to an insurance broker as Himmelfarb's partner [R. 913, 916, 919, 937, 939], and had a fire insurance policy, previously issued to Himmelfarb, reissued to both appellants as partners operating the Acme Meat Company [Gov. Ex. 44; R. 913-914, 923-926, 937]. The policy thus reissued was delivered to Himmelfarb and Ormont [R. 944-945]. However, when called upon to explain his status to the agents investigating his 1944 income, Himmelfarb claimed in an affidavit [Gov. Ex. 50-C; Appendix hereto] that during 1944 he was an employee of Acme Meat Company, and that between May 1, 1944, and April 30, 1945, he engaged, with Ormont, in a "joint venture," from which he received \$35,694.42 [R. *id.*].

Himmelfarb admitted in that affidavit that no part of that \$35,694.42 was reported by him on his individual Federal income tax 1944 return [R. *id.*].

In further explanation of this \$35,694.42, Himmelfarb had sent a letter to the Agents [Gov. Ex. 50-D; Appendix hereto], in which he explained, in substantiation of that amount "as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total * * * this record is accurate * * * no other records were kept * * * there was no set time for distributions [of the profits]. Distributions were made equally at various intervals. The total amount I received was \$35,694.42. This represented the total amount received by me and there were no expenses. * * * This represented both the gross and the net amount." [R. *id.*]

Himmelfarb's bank records disclosed certain of his income for 1944 [R. 372-375, 380-387, 515, 554-555, 557-560, 568-571].

The agents also had available Himmelfarb's net worth statement, prepared by Himmelfarb's certified public accountant and signed by Himmelfarb [Gov. Ex. 50-B, App. hereto], showing Himmelfarb's cash on hand, cash in banks, war bonds, and other assets, in the sum of \$42,863.45, less liabilities of \$375.94 [R. *id.*]. The "Acme Meat Company Receivable" is shown as \$3,308.45, and it is followed by the explanation that "In addition to this, $\frac{1}{2}$ of the profits for the year 1945 accrues. On April 30, 1945, this has been tentatively estimated at \$9,561.06" [R. *id.*].

As a result of their examination of all available books and records, other data introduced in evidence at the trial,

bank records, and material, both written and oral, furnished by Himmelfarb, the agents of the Bureau of Internal Revenue found that Himmelfarb received considerable income in 1944 over and above that reported by him on his income tax return for that year [R. 954-955].

Although it was Himmelfarb's contention that the \$35,694.42 income reported by him on the Partnership Return was from a separate joint venture on a fiscal year basis and, therefore, did not have to be reported on the 1944 return, the jury, by bringing in the verdict of guilty, clearly disbelieved that story and rejected Himmelfarb's contentions in that respect. By its verdict, the jury demonstrated that as a fact it found that the \$35,694.42 should have been reported, at least so much of it as was earned in 1944, on the 1944 return, and found as a fact also that there was no true joint venture on a fiscal year basis the income from which could have been properly reported on a fiscal year return. This the jury was privileged to do on the basis of the facts before it and permissive inferences from those facts.

It is manifest upon the basis of the facts summarized here, that the jury acted fully within its province in concluding that Himmelfarb wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1944 by filing a false and fraudulent return for that year, and by concealing his true income from the United States. It is also beyond dispute that Himmelfarb's true income for 1944, on a community

property basis was, as he well knew, closer to \$17,752.65 than the \$4,111.74 which he had reported.²

The understatement of income having been established, the sole remaining question was whether it was understated wilfully, and that element of the case was plainly and properly inferrable by the jury from the facts we have delineated as to Himmelfarb.

With the law relied upon by Himmelfarb (H. A. B. 23-24), we have no quarrel. It is, however, applicable in situations of a type with which this Court is not here confronted, and it is specious to argue from that law, as Himmelfarb does in his brief, that "the verdict of the jury is without evidentiary support" (H. A. B. 23).

Himmelfarb should not now be permitted to escape the consequences of his deliberate attempt to defraud the United States. Despite the strained and technical interpretation placed upon the evidence by Himmelfarb in his brief, his guilt of the offense as to which he was convicted below, is clear. This Court should not render any aid to so gross and wilful a violator of the law. His judgment should be affirmed.

Point II.

Himmelfarb's second point (H. A. B. 41-43) is governed by the first point, since it is predicated upon the sufficiency of the evidence without rearguing the facts, it is sufficient to say that the motion for acquittal at the close of the Government's case was properly denied.

²The grand jury was not asked to and did not indict Mrs. Himmelfarb, who filed an income tax return for 1944 covering her community half of Himmelfarb's income.

Point III.

Himmelfarb complains (H. A. B. 42-50) that certain exhibits should not have been received in evidence against him, and seeks to have the judgment reversed for that reason. Himmelfarb's complaints are without foundation, as we demonstrate below.

A.

The exhibits consisted in part of Himmelfarb's and his wife's bank records (H. A. B. 42-44). These were introduced at the beginning of the trial, and were to have been, in part, the basis of the Government agents' testimony as to what they found respecting Himmelfarb's income for 1944. Upon the objections of Himmelfarb, much of the testimony offered by the Government in that connection, was rejected by the trial court.

If the exhibits on their face even in part offer support for the verdict and judgment, they are unobjectionable. And if they offer no such support, their receipt in evidence, even if erroneous, was harmless error. See, *e. g.*, the *Oliver*, *Gusick*, *Capone*, *First National Bank*, and *Gleckman* cases, *supra*.

B.

The insurance policy and insurance reports (H. A. B. 47-48) received in evidence were clearly admissible as proof of Himmelfarb's true status at the Acme Meat Company, to show his true income in 1944. Himmelfarb's inconsistent statements concerning his status given to the insurance broker and used by him in reissuing the

policy, and to the Government agents also had an important bearing upon Himmelfarb's wilfulness, his veracity in the disclosures he made to the agents, the truth of his claim that the approximately \$71,000 was earned on a fiscal year-joint venture basis, and all of the issues in the case. By showing that Himmelfarb thus varied his stories as to his status, the Government was providing a proper basis for the jury's disbelief of the fiscal year-joint venture story.

These exhibits were properly admitted in evidence.

C.

The net worth statements to which Himmelfarb now objects (H. A. B. 48-49) were prepared by his accountant and sent, under Himmelfarb's signature, to the Government agents in support of Himmelfarb's efforts to save himself after his attempt to defeat and evade the payment of his correct tax had been discovered. Certainly these documents were admissible at the trial below.

And the utility of net worth statements in the determination of a taxpayer's income, is too well established to require extensive discussion. See, *e. g.*, *Malone v. United States*, 94 F. (2d) 281 (C. C. A. 7th), cert. den. 304 U. S. 562.

Point IV.

Himmelfarb complains concerning the Government's closing arguments to the jury (H. A. B. 50-63). Plainly Himmelfarb here seeks to divert attention from his own patent guilt by pointing an accusing finger elsewhere. In this he fails.

It would be of but little or no value to this Court to review the evidentiary basis for the closing argument made by the Government, or to discuss the argument in detail. We respectfully suggest that this Court read all of the arguments of all counsel [R. 1450ff.], so that the propriety of the Government's argument can be most clearly seen.

A.

Himmelfarb appears to object to the changing use of the plural pronoun "they"—referring to him and Ormont—and the singular pronoun "he," or appellants' individual names, during the course of the Government's arguments. Himmelfarb conveniently overlooks the fact that this change was necessitated by the limited admission of certain of the evidence, due principally to Himmelfarb's own objections, as well as Ormont's, with which the record abounds.

The entire argument of the Government was plainly within proper bounds and was in direct keeping with the evidence in the record and the permissive inferences to be drawn from it. Himmelfarb plainly has no cause to complain on this score.

The trial was long, primarily due to appellants' minute examination of witnesses and exhibits, and the jury was

clearly aware of what appellants had done collectively and individually. The jury was not confused as to the basic facts in this case; facts which were disclosed *from the original 1944 returns, together with the "Partnership Return" filed in May, 1945, and the documents, including the letters, net worth statements and affidavits*—and eliminating from consideration for the moment all other evidence in the record—that appellants and each of them individually received a far greater income in 1944 than they had reported, that the unreported sums were net income; that they had no records other than the cumulative totals; and that they admittedly did not include upon their 1944 income returns substantial funds received by them. These undenied facts, flowing primarily from appellants, were enough, without more, to warrant a verdict of guilty upon the charges in this case. And there was more evidence, of course, as we have shown above.

Himmelfarb clearly was not prejudiced by the Government's arguments to the jury.

B.

Himmelfarb also objects (H. A. B. 59-60) to the reference by the Government to the availability to him of the testimony of two witnesses, Malin and Moody, and his failure to call them to the stand. This is a slick argument. It fails to apprise the Court, however, of the fact that the Government mentioned these men only. Himmelfarb's own counsel in his closing argument to the jury had called attention to the limited extent to which Malin testified [R. 1501-1502] and was the first to mention Moody, in a manner creating the inference that Moody may have been responsible for the contents of Himmelfarb's return [R. 1507]. We think the Govern-

ment had the right to answer the argument made by Himmelfarb's counsel.

Furthermore, there is nothing wrong in an *argument* to the effect that certain witnesses were available to defendant but were not called by him to the stand, especially where, as here, the defendant himself makes the first reference to such matters.

And the trial court adequately protected appellant by its instructions as to the entire burden of proof being on the Government, the presumption of innocence and others [R. 1564ff, 1588].

Himmelfarb's cases cited in his brief (H. A. B. 60-61] to the general, and in this case wholly inapplicable proposition of law that misconduct of counsel and improper argument "in extreme cases" warrants (but does not mandatorily require) a reversal, only demonstrates further the paucity of legal support for his untenable contentions in this case, and the extremes to which he must go in his efforts to extricate himself from the eminently proper judgment below.

The fact that no objection was raised by Himmelfarb at the time of the argument is conceded by him (H. A. B. 61). His strained efforts (H. A. B. 61-63) to shift elsewhere the blame for this neglect on his part, are unworthy of consideration. He says he made no objection because he knew that "the trial judge was laboring under" a "misapprehension," and he knew that he was thus "fore-doomed with respect to any such objection," and he did not want to "emphasize such improper argument" before the jury (H. A. B. 61-62). This contention is clearly frivolous in its entirety.

Point V.

Himmelfarb complains (H. A. B. 64-72) that certain instructions requested by him were refused by the trial court.

Examination of the instructions actually given to the jury [R. 1564-1591] discloses that the jurors were advised fully as to the law and the rights of appellants. The specific instructions refused were either not proper statements of the law or did not reflect the evidence in the case (Instr. 17, H. A. B. 64; Instr. 25, H. A. B. 66; Instr. 27, H. A. B. 67; Instr. 28, H. A. B. 68; Instr. 30, H. A. B. 69; Instr. 35, H. A. B. 70) or were given in another form (Instr. 22, H. A. B. 65; Instr. 35, H. A. B. 70), and the cases cited by appellant Himmelfarb at this point (H. A. B. 71-73) are of no assistance to him.

Point VI.

The contentions (H. A. B. 73-74) that the trial court erred in denying Himmelfarb's motion for acquittal notwithstanding the verdict and for a new trial, are without merit.

We have already discussed the facts and the law in this case. Nothing in either required the trial court to set aside the verdict of the jury and acquit Himmelfarb or to grant to him a new trial.

Himmelfarb was given a fair trial, and no error was committed as to him requiring reversal of his judgment and sentence. Upon all the circumstances disclosed by the facts herein, the sentence was clearly reasonable and just.

Summary.

The evidence in this case presents a gross violation of Federal law by appellants Ormont and Himmelfarb in connection with their 1944 income tax returns. Appellants were more than adequately protected throughout the trial by the rulings of the trial judge and by the activities of their counsel. Evidence of a type, which, we submit, should have been admitted into the record, was excluded by the Court upon motion of either one or the other of the appellants, and the contents of various records and documents to which the investigating agents had been given access could not be brought before the jury because of the absence of the original, private books and records of the appellants and which they had, upon which the Court predicated its refusal to admit other evidence showing their contents.

The unusual length of the briefs filed by each of the appellants is not a coincidence; they required considerable space to set forth each of the minor and insignificant objections upon which they place their last hope of escape from the consequences of their illegal acts.

Each of the appellants was clearly guilty of the offense charged against him. Their efforts before this Court to set aside the eminently proper verdicts below and the judgments against them should be rejected by this Court.

Conclusion.

No reversible error was committed by the trial judge or by the prosecuting attorney. The appellants were given a fair trial. The verdicts are supported by the evidence. The sentences are moderate and clearly justified in the light of all the circumstances. The judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Assistant United States Attorney;
Attorneys for Appellee.

APPENDIX.

Exhibit 50-B.

PHILLIP HIMMELFARB

Net Worth Statement

April 30, 1945

ASSETS

Cash on Hand	\$22,261.85
Cash in Banks:	
Bank of America—Vernon Branch:	
Phillips Meat Co.—Checking Account	4,236.73
Savings Account	3,687.88
Bank of America—First & Chicago Street Branch	
Checking Account	564.99
War Bonds (at cost) 10—\$25.00 “E” Bonds	187.50
Fixed Assets:—(at cost)	
4 Family Unit—116 N. Soto Street	6,500.00
Automobile	1,100.00
Truck—(Bought Dec. 1943)	798.75
Adding Machine 5/1/44	217.30
*Acme Meat Company Receivable	3,308.45
	<hr/>
TOTAL ASSETS	\$42,863.45

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LIABILITIES

Thelma Himmelfarb (Mother)	\$ 212.00
Mortgage Payable on Real Estate	163.94
	<hr/>
Total Liabilities	375.94
Net Worth	42,487.51
TOTAL LIABILITIES AND NET WORTH	\$42,863.45
	<hr/> <hr/> <hr/>

*In addition to this, 1/2 of the profits for the year 1945 accrues. On April 30, 1945, this has been tentatively estimated at \$9,561.06.

The above statement is correct to the best of my knowledge and belief.

July 30, 1945.

PHILLIP HIMMELFARB

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 50-B. Date Jun 6-1947 No. 50-B Identification. Date Jun 6-1947 No. 50-B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 50-C.

State of California, County of Los Angeles—ss.

AFFIDAVIT OF PHILLIP HIMMELFARB

I, Phillip Himmelfarb, being first duly sworn and being of lawful age, depose and state:

That during the year 1944 I was an employee of the Acme Meat Company;

That during the period commencing with May 1, 1944, and ending on April 30, 1945, I received from the joint venture, which I have engaged in with Samuel Ormont, the sum of \$35,694.42; Samuel Ormont received from this joint venture a similar amount;

That the total amount of this aforementioned income received by me was not reported by me for the calendar year 1944 but was reported in full in a joint venture return for the period commencing with May 1, 1944, and ending on April 30, 1945.

PHILLIP HIMMELFARB

Affiant.

Subscribed and sworn to before me this 28th day of July, 1945.

[Seal]

ELMER F. WILSON,

Notary Public in and for said County and State.

In and for the County of Los Angeles, State of California.

My Commission Expires March 22, 1949.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 50-C. Date Jun 6-1947 No. 50-C Identification. Date Jun 6-1947 No. 50-A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 50-D.

Los Angeles, California

July 30, 1945

Mr. Donald Bircher, Special Agent
Federal Building
Los Angeles, California

Dear Mr. Bircher:

In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total.

This record is accurate to the best of my knowledge and belief. No other records were kept. All of the money received is represented by the total reported.

Respecting the division of the profits:

You ask if we divided the profits weekly, monthly or at the end of the fiscal year. In answer to that, there was no set time for distributions. Distributions were made at various intervals.

The total amount I received was \$35,694.42. This represented the total amount received by me and there were no expenses.

Respecting your inquiry whether the total reported was both the gross and the net, the answer is yes. This represented both the gross and the net amount.

Very truly yours,

PHILLIP HIMMELFARB

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 50-D. Date Jun 6-1947 No. 50-D Identification. Date Jun 6 1947 No. 50-D in Evidence. Clerk, U. S. District Court, Sou. Dist of Calif. J. M. Horn, Deputy Clerk.

Exhibit 51-A.
SAMUEL ORMONT
BALANCE SHEET
April 30, 1945

Statement of Net Worth

Cash in Bank:

Bank of America—Brooklyn Soto Branch	
Savings Account	\$ 55.28
Security First National Bank	
Commercial Account	10,765.57
Cash on Hand—Estimated	400.00
Government Bonds (Cost)	92,412.50
Capital Account—Acme Meat Company	37,813.16
Profits 1/1/45 to 4/30/45	9,561.06
	<hr/>
TOTAL	\$151,007.57

Note:

The Capital Account of Samuel Ormont on the books of Acme Meat Company at 4/30/45 shows the balance of \$37,813.16 before profits for the period 1/1 to 4/30/45. Included in liabilities is the account of Dora Goldberg, \$16,800.00, which was set up to reflect the taxpayer's estimate of the amount due to his mother.

The above statement is correct to the best of my knowledge and belief.

July 30, 1945.

SAMUEL ORMONT.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 51-A. Date Jun. 6, 1947, No. 51-A identification. Date Jun. 6, 1947, No. 51-A in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 51-C.

Los Angeles, California

July 30, 1945

Mr. Donald Bircher, Special Agent

Federal Building

Los Angeles, California

Dear Mr. Bircher:

In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total.

This record is accurate to the best of my knowledge and belief. No other records were kept. All of the money received is represented by the total reported.

Respecting the division of the profits:

You ask if we divided the profits weekly, monthly or at the end of the fiscal year. In answer to that, there was no set time for distributions. Distributions were made at various intervals.

The total amount I received was \$35,694.42. This represented the total amount received by me and there were no expenses.

Respecting your inquiry whether the total reported was both the gross and the net, the answer is yes. This represented both the gross and the net amount.

Very truly yours,

SAMUEL ORMONT.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit #51-C. Date Jun. 6, 1947, No. 51-C identification. Date Jun. 6, 1947, No. 51-C in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 51-D.

State of California, County of Los Angeles—ss.

AFFIDAVIT OF SAMUEL ORMONT.

I, SAMUEL ORMONT, being first duly sworn, depose and state:

That I am the owner of a meat packing business, conducted by me under the name Acme Meat Company:

That during the period commencing with May 1, 1944, and ending on April 30, 1945, I received from a joint venture between myself and one Phillip Himmelfarb, as my share of the profits therefrom, a sum totaling \$35,694.42;

That this amount was not recorded on the books of the Acme Meat Company because it belonged to the joint venture;

That the total amount was not reported by me as income for the calendar year 1944 but was reported in full in a joint venture return for the period commencing with May 1, 1944, and ending on April 30, 1945;

That Phillip Himmelfarb received a similar amount from this joint venture.

SAMUEL ORMONT,
Affiant.

Subscribed and sworn to before me this 27th day of July, 1945.

(SEAL)

F. P. PHILLIPS,

Notary Public in and for said County and State.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 51-D. Date Jun. 6, 1947, No. 51-D identification. Date Jun. 6, 1947, No. 51-D in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

and 1944 and
 the best of my knowledge and belief
 constitute the total net income received by
 me which was not reported in my Federal
 income tax return
 received pursuant to report 1944. Since the amount
 has been ascertained by the IRS with full
 and proper audit.

Exhibit 2.

if.

on

Alfred

11-1-10

25

$\frac{1}{T_1} + \frac{1}{T_2}$

- J. P. H. Hammett and J. W. H. - 27

[Faint handwritten notes, possibly bleed-through from the reverse side.]

[illegible]

11, 2, 24, 5, 7

81-1442

[illegible]

PARTNERSHIP RETURN OF INCOME

1944

For Calendar Year 1944

or fiscal year beginning **May 1,** 1944 and ending **April 30, 1945**

File this return with the Commissioner of Internal Revenue at the office in which the partnership has its principal place of business.

(PRINT PLAINLY NAME AND BUSINESS ADDRESS)

Sam Ormont and Phillip Himmelstark
Imperial Highway and Garfield Avenue
Southgate
California

Business or Profession **Miscellaneous Enterprises**

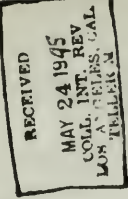
GROSS INCOME.

1. Gross receipts from business or profession
2. Less cost of goods sold
- (a) Inventory at beginning of year
- (b) Merchandise purchased during year
- (c) Cost of labor, supplies, etc.
3. Total, line (a), (b), and (c)
- (d) Less inventory at end of year
4. Net profit (or loss) from business or profession
5. Interest on bonds, mortgages, or other securities
6. Dividends from stocks
7. Interest on Government bonds
- (a) From Schedule A, line (c)
- (b) From Schedule C, line (c)

Miscellaneous Income

71,388 84
71,388 84

71,388 84
71,388 84



8722172

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 7)

Page 2

Description of obligations or securities

Interest and dividends received or accrued during the year

Subject to surtax only:

- (a) United States savings bonds and Treasury bonds issued prior to March 1, 1941. (Amount owned at end of year, \$)
- (c) Obligations of instrumentalities of the United States issued prior to March 1, 1941 (other than Federal land banks, Federal intermediate credit banks, and joint-stock land banks)
- (d) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 31, 1942.
- (e) Total: \$
- (f) Less: Amortizable bond premium \$
- (g) Balance of interest. (Enter as item 7(c), page 1.) \$

Subject to normal tax and surtax:

- (b) Treasury notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or institutionality thereof
- (c) Less: Amortizable bond premium \$
- (d) Balance of interest. (Enter as item 7(b), page 1.) \$

Schedule B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expressed sale and cost of improvements when sold (for sales on or after March 1, 1941)	6. Depreciation allowed (or allowable) since acquisition or sale (for sales on or after March 1, 1941)	7. Gain or loss (column 3, plus column 5, less the sum of columns 4 and 6)
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$

Total net gain (or loss) (enter as item 10, page 1)

NOTE.—If any item in Schedule B was acquired by the organization at a price less than its purchase price, attach a statement explaining how acquired.

Schedule C.—TAXES. (See Instruction 18)

Nature	Amount	Nature (continued)	Amount (continued)
	\$		\$
	\$		\$
	\$		\$
	\$		\$

Schedule D.—BAD DEBTS. (See Instruction 20)

1. Taxable year	2. Net income reported	3. Bad debts as a result of operations	4. Bad debts as a result of operations (other than those reported in item 3)	5. Total bad debts as a result of operations	6. Amount charged against income
1941	\$	\$	\$	\$	\$
1942	\$	\$	\$	\$	\$
1943	\$	\$	\$	\$	\$
1944	\$	\$	\$	\$	\$

NOTE.—Check whether deduction claimed represents debts which have become worthless [] or in addition to a reserve [].

Schedule E.—DEPRECIATION. (See Instruction 21)

1. Date acquired	2. Description of property (if building, state whether it is a structure)	3. Cost or other basis (for depreciation)	4. Depreciable basis at end of year	5. Depreciation allowed (or allowable) in year	6. Remaining depreciable basis at end of year	7. Estimated life used in computing depreciation	8. Estimated depreciation for year	9. Depreciation allowed (or allowable) for year
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$

Form No.	2. Explanation	3. Amount		1. From No. (continued)	2. Explanation (continued)	3. Amount (continued)
			\$			
						\$

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instructions 27-28)

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired	3. Date sold	4. Gross sales price (continue price)	5. Cost or other basis	6. Expense of sale	7. Depreciation allowed for improvement subtraction or acquisition or March 1, 1913	8. Gain or loss (column 1 plus column 6, less column 7, less the sum of columns 8, 9, and 10)	9. Percentage	10. Amount	Gain or loss to be taken into account
	Mo. Day Year	Mo. Day Year								

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

[illegible]

Total net short-term capital gain or loss (enter in line 1, column 2, of summary below)

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

[illegible]

Total net long-term capital gain or loss (enter in line 2, column 2, of summary below)

SUMMARY OF CAPITAL GAINS OR LOSSES

1. Classification				3. Net gain or loss to be taken into account in column (b) above		4. Total net gain or loss taken into account in column (d) of the summary	
		a. Gain	b. Loss	a. Gain	b. Loss	a. Gain	b. Loss
1	Total net short-term capital gain or loss (enter in column 1)	\$	\$		\$		\$
2	Net capital loss (amount of gain or loss shown in column 1)						
3	Total net long-term capital gain or loss (enter in column 3)						
4	Total net long-term capital gain or loss (enter in column 4)						

NOTE: If any item in Schedule G was acquired by the organization otherwise than by purchase, attach a statement explaining how acquired.

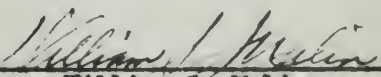
Schedule H.—CONTRIBUTIONS OR GIFTS PAID. ¹(See Instruction for Schedule I)

Name and address of organization	Amount	Name and address of organization (continued)	Amount (continued)
	\$		\$

Sam Ormont and Phillip Himmelfarbe

Year Ending 4/30/45

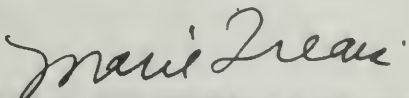
This return has been prepared from information furnished by the taxpayers, without audit or independent verification on my part.



William S. Malin

Subscribed and sworn to before me this

24th day of May, 1945.



Notary Public Los Angeles Co., Calif.

No. 11662.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

WILLIAM KATZ,
415 Chester Williams Building, Los Angeles 13,
Attorney for Appellant, Phillip Himmelfarb.

FILED

JUL 21 1948

PAUL P. O'BRIEN,

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No. 11662.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

It is a basic and cardinal principle of our democracy that the government, its subdivisions and agencies shall at all times and in all manner deal fairly and justly with its citizens. Consequently, it is both shocking and disturbing to find the government falling far short of the fundamental principle of fairness and honesty in the presentation of its case against a private citizen.

Particularly abhorrent is such lapse when made or done by an agency of the government charged with the responsibility of administering or enforcing our lofty principles of law and justice.

The United States Attorney has presented to this court in the "Statement of Facts" set forth in Appellee's Brief a wholly distorted, incorrect, equivocal and deceptive state-

ment of the evidence adduced in this case against appellant Phillip Himmelfarb.¹

Moreover, the government has coupled with such "Statement of Facts" the wholly unwarranted and unsupportable accusation (R. B.² p. 4, n. 4) that appellant (as one of the "appellants") has presented an inaccurate, partial statement of facts in his brief, prepared in disregard of the controlling rule on appeal and loaded the record with pages of matter in no way bearing on the appeal.³

¹Except where otherwise indicated, the term "appellant" throughout this brief, as in the Opening Brief, refers to PHILLIP HIMMELFARB only, and shall, as in said Opening Brief and throughout the trial of this case in the Court below, concern himself solely and entirely with the case against him and not with the case against his co-defendant, Sam Ormont.

²Throughout this brief, the letters "R. B." will refer to appellee's reply brief, and "O. B." to appellant's opening brief, and all matters appearing in parenthesis and italics throughout this Brief are appellant's, unless otherwise indicated.

³Appellant diligently sought to be, and is certain that he was most meticulous in fully, fairly and accurately setting forth in the statement of facts in his Opening Brief all of the pertinent evidence offered and received against and for him in the light most favorable to the government. A careful reading of the record herein establishes that the charge by the government that appellant based his statement of facts on conflicting testimony or selected excerpts favorable to himself, or matters going to the credibility of witnesses, or disregarded the rule on appeal that evidence is viewed in the light most favorable to the government, in so far as such charges are directed against this appellant, are as completely unfounded as they are lacking in good faith. This appellant has not placed in the record before this court one single solitary page of matter which occurred in any case brought against him under the Emergency Price Control Act, or in any other case under any other Act. The author of appellee's brief exhibited so little regard for accuracy respecting, and the importance of the record that he did not deem it necessary to distinguish the record herein against appellant from the record herein against SAM ORMONT, and to disclose to the court that of the "150 pages of matters" referred to by him, 6 pages [Tr. pp. 80-86] thereof set forth a *motion made by the government in this case* to consolidate the trial thereof with

Such conduct on the part of the United States Attorney can neither be justified nor condoned. Because the charge herein made by appellant is a grave one and should not, and unquestionably will not, go unnoticed by this court, appellant intends to devote a major part of this brief to establish the truth thereof.

Counsel for the government are fully aware that the record in this case cannot and does not support the verdict and judgment rendered and entered against appellant. Instead of being frank and forthright with this court, with themselves, and the appellant, and so stating, or merely setting forth the actual facts of this case to let such facts speak for themselves to this court, the government has sought to present to this court on appeal a stronger case than it made in the court below, and actually has to present to this court.

One stratagem by which counsel for the government seek to accomplish this base purpose and the manner by which they shirk their bounden duty to fairly state to this

another action then pending, points and authorities in support thereof and the order thereon; 25 pages thereof [Tr. pp. 237-262] are *proceedings of this case* in the court below, and that the remainder thereof pertains to a motion and evidence and argument in support thereof, by SAM ORMONT for immunity and to bar further prosecution of him [Tr. pp. 141-203; 214-236; 262-301], none of which matters, with the exception of the 25 pages of proceedings in this case in the court below [Tr. pp. 237-262], were designated as a part of or caused to be included in the record of this case by appellant, as is established by the very transcript references cited by appellee, and the designation of record filed by appellant in this court. That part of the Designation of Record on Appeal, designating the portion of the reporter's transcript to be included in the record herein, which comprises all of the testimony offered and received against and for appellant is reproduced in Appendix A hereof in order that this court may, by reference thereto, more readily delineate from the entire record herein the record of appellant.

court the facts adduced in this case against the respective appellants is disclosed in footnote 7 on page 6 of the government's brief.

This footnote was shrewdly cast in such language as to avoid affirmatively stating falsely in the first sentence thereof that most of the evidence in the record was admitted against both appellants. By failing, however, to truthfully disclose to this court that most of the evidence in the record, including such thereof as related to the joint operations of Ormont and appellant, was not admitted against appellant at all but received only as against Ormont, appellee infers that most of the evidence in the record was admitted against both Ormont and appellant.

The second sentence of the aforequoted footnote is, of course, intended to make inevitable such erroneous inference on the part of this court by implying that in addition to the evidence in the record against both Ormont and appellant, there was evidence admitted against each, which the court was careful to limit to the defendant to whom it applied, *i. e.*, against whom it was admitted.

In the third sentence of the aforequoted footnote, counsel for the government imply that appellee's statement of facts first sets forth the evidence in the record admitted against both defendants, and then "point(s) out specifically what facts are applicable to each of the appellants separately." This, of course, is intended to bolster the false implication that the words "what the facts in that respect show on an over-all basis" is synonymous with the words "what the facts in that respect show against both appellant and Sam Ormont." The government fails, however, at any point in its brief to point out what evidence in the record was admitted solely against appellant and what

evidence in the record was admitted solely against Sam Ormont, and this notwithstanding the fact that the most rudimentary principles of fairness and justice required the government to present separate statements of the facts of the respective cases adduced against the respective defendants.

The first paragraph of the "Facts" upon which the government relies (R. B. p. 5)⁴ in so far as it may state facts and be supported by the record herein relates to evidence admitted as against Sam Ormont only [Tr. pp. 339-345, incl.]. There is no evidence in the record herein against appellant to support said paragraph.

The first sentence of the second paragraph of appellee's statement (R. B. p. 5) is supported by the record against appellant and the entire substance thereof was included in appellant's statement of facts (O. B. p. 5).

The government states as a fact in the second sentence of its second paragraph that "Himmelfarb's true gross income for that year (1944) was \$18,252.65, his net income for income tax purposes was \$17,752.65, and the correct tax due was \$5,843.91, as shown below." Such statement is wholly unsupported by the record, and appellee, because of an utter impossibility so to do, gives no citation to the transcript or reference to any exhibit in support thereof. It should be noted by this court that such statement is not made as a contention or argument, but contrariwise, is set forth as a fact established by the record.

⁴Each paragraph of appellee's statement of facts herein discussed will be designated by consecutive number, commencing with the first paragraph on page 5, as paragraph No. 1.

The first sentence of the third paragraph of appellee's statement (R. B. p. 5), exclusive of the phrase "by requesting permission to examine appellants' books and records," is supported by the record against appellant, and the entire substance thereof, less the indicated phrase, was included in appellant's statement of facts (O. B. pp. 8-9).

The second sentence of the third paragraph is supported by the record against appellant in so far as it states that on May 24, 1945, a partnership return of income, disclosing joint income for appellant and Sam Ormont for the period May 1, 1944 to April 30, 1945, in the sum of \$71,-388.84, and that fact was plainly stated in appellant's statement of facts (O. B. pp. 5 and 6).

The adjectives describing the income referred to in such third paragraph as "additional, previously unreported," is a wholly gratuitous contribution to the record by counsel for the government.

The record is wholly barren of any evidence against appellant to support the first and last sentence of the fourth paragraph of appellee's "statement of facts," and any evidence which may be in the transcript respecting the matters stated in those sentences was admitted as against Sam Ormont only. There is some evidence favorable to the government tending to establish the second sentence of the fourth paragraph, and the evidence in that regard was plainly set forth by appellant in his statement of facts (O. B. pp. 9-10).

At this point in appellee's "statement of facts" (R. B. p. 6), and following the paragraph designated by appellant as Paragraph 4, appellee by way of a footnote sets forth "for the convenience of the court" a purported "table" allegedly

“prepared” “from the evidence in the case.” In such table the government lists the amounts shown in appellant’s 1944 return as his gross income, allowable deductions, net income and income tax, and in juxtaposition thereto the purported “true figures” therefor for said year. It will be observed by this court that the statement “true figures” and the purported amounts listed thereunder are stated as a fact established by the record and not as a contention advanced or argument made. Again, no citation to the transcript or to any exhibit is given in support of such “table,” and the purported “true figures” set forth therein by appellee. Both such figures and the designation are wholly unsupported by any evidence in the record.

The fifth, sixth and seventh paragraphs of appellee’s statement (R. B. p. 7) will be considered together for the reason that the government cites pages 427-435, inclusive, of the transcript in support of the “facts” recited in said paragraphs.⁵

Appellant respectfully asks this court where in the cited portion of the record there is any evidence of or reference to:

- (a) “*income from sales of meat*”;
- (b) “*sales of meat made by each of appellants within the ceiling prices set by the Office of Price Administration during the period of price control on meat*”;

⁵Appellant has reproduced said pages of the transcript in Appendix B hereof so that this court may more readily see that not only are the said paragraphs wholly unsupported by the record against appellant, but that the “facts” as set forth by counsel for the government in its brief bears no semblance of similarity to the record.

- (c) income from or sales of meat which *“was usually reported on invoices and recorded on these books”*;
- (d) *“figures on the 1944 income tax returns upon which this case is based, were based by appellants upon these ceiling, recorded prices”*;
- (e) *“in addition to that income each of the appellants received as income from the sale of meat certain ‘bonus’ or ‘overceiling’ payments which consisted of additional cash sums of money, paid by appellants regular customers in connection with their purchases of meat from the Acme Meat Co., in addition to the legal ceiling prices reported on appellants’ books”*;
- (f) *“these additional ‘bonus’ payments were not recorded on appellants’ books”*;
- (g) *“nor were such sums reported by either appellant as part of his income for income tax purposes for the calendar year 1944 upon his income tax returns for 1944.”*⁶

Appellant further respectfully requests this court to review that portion of appellant’s statement of facts (O. B. p. 6) narrating the evidence contained in pages 428-435,

⁶The government cites in support of this statement Government’s Exhibits 50 and 51. There are no Exhibits 50 or 51. There are Government’s Exhibits 50-A, 50-B and 50-D, which were received in evidence against appellant only, and 51 A, B and D received against SAM ORMONT only. Exhibits 50-A and 50-B are identical statements of net worth of appellant as of April 30, 1945, and Exhibit 50-D is a letter, dated July 30, 1945, signed by appellant and addressed to Donald Bircher, Special Agent of the Bureau of Internal Revenue, advising him, in substance, that the total amount received by appellant from the joint venture was \$35,694.42; that a cumulative record only was kept of the amounts received, and that the profits were distributed at irregular intervals.

inclusive, of the transcript, both for the purpose of comparing same with appellant's statement of facts based thereon and to determine the validity of the derogatory criticism thereof made by government counsel.

Any evidence adduced in support of Paragraph 8 of appellee's statement in so far as said paragraph may set forth facts supported by the record herein was admitted as against Sam Ormont only. There is no evidence in support of said statement in the record herein against appellant.⁷

Although without bearing on the facts of the case of appellant herein because it pertains to evidence admitted against Sam Ormont only, it may be well, as a striking illustration of the "fairness" of the government's brief to call the attention of this court to the fact that the invoices referred to by the government as "not entered on its books, nor was that income included as part of the gross or net income for 1944 reported by appellants," were invoices for the year 1942 [Tr. pp. 398-401; 416-417].

There is no evidence whatever in the record against appellant herein of "additional unreported 'bonus receipts,' " as asserted by appellee in Paragraph 9 of its statement, and the matters set forth in that paragraph fall in the same category as do the statements in the paragraphs hereinbefore designated and discussed as 5, 6, 7 and 8. It will be noted that the transcript reference in

⁷See O. B. pp. 3-4, giving transcript citations and illustrative excerpts from record re understanding and agreement throughout trial that all evidence by the government is offered and received against defendant ORMONT only, unless government counsel avowed or indicated that the evidence was offered against appellant, or against both defendants.

support of Paragraph 9 is the same as that given in support of Paragraphs 5, 6 and 7 above.

To obviate further laboring the point herein established, and in the interest of compelling brevity, appellant unequivocally asserts that the remainder of appellee's "statement of facts," commencing with page 8 thereof to page 16; is wholly unsupported by the record herein against appellant, with the exception of the following matters therein mentioned:

(1) "Agents of the Bureau of Internal Revenue, as stated before, conducted an investigation into the income tax returns and the income of each of the appellants (appellant) for the years 1942, 1943 and 1944" (R. B. p. 8; O. B. p. 7);

(2) An agent in the course of his investigation examined the original, and the government later introduced a photostatic copy of appellant's 1944 return (R. B. p. 9; O. B. p. 7);

(3) The government introduced in evidence a partnership return filed by Sam Ormont and appellant, which declared a net income for the fiscal period May 1, 1944 to April 30, 1945, of more than \$71,000.00 (R. B. p. 9; O. B. p. 5);

(4) The government introduced some bank records of appellant's account (R. B. p. 9; O. B. pp. 5-6);

(5) Appellant submitted various documents and statements to the agents, which included Exhibits 50 A, B and D (R. B. p. 9; O. B. pp. 12 and 14);

(6) In connection with the investigation of his income, appellant hired a certified public accountant. The accountant prepared various documents on behalf of appellant, and after appellant signed some of them, the accountant sent them to the government agents conducting the investigation. The documents contained factual data which the accountant had obtained from appellant, from books and records, and other sources of information which he furnished to him (R. B. pp. 15-16; O. B. pp. 12-14);

(7) The accountant likewise prepared and filed the "Partnership Return" which appellant and Sam Ormont both signed, reporting more than \$71,000.00. This return disclosed the division of this sum as going to "Sam Ormont—50%, \$35,694.42, and Phillip Himmelfarb—50%, \$35,694.42"; the accountant made this division upon instructions and based upon information furnished by appellant (R. B. p. 16; O. B. p. 13);

(8) Appellant Himmelfarb did not testify at the trial; he introduced character evidence, and the evidence of an accountant, to-wit, Ralph Kibbee, who, in the main, performed certain mathematical computations on behalf of Himmelfarb on the basis of the record in evidence (R. B. p. 16; O. B. pp. 15-19).

Appellant wishes at this point to direct this court's attention to the fact that the government has attached a photostatic copy of Exhibit 56 for identification to and in the appendix of its brief. Exhibit 56 for identification

was never received in evidence. It was offered in evidence, but objections interposed to its admission were sustained [Tr. pp. 1166-1167], and said proffered exhibit was excluded. Exhibit 56 for identification, therefore, is not a part of the record in this case.

Similarly, appellant takes specific exception to the designation by counsel for the government of the income declared by the Information Return filed by appellant and his co-defendant Sam Ormont, as "additional and previously unreported income," and to the implication that such income for the period May 1, 1944 to April 30, 1945 was reportable or payable for the calendar year 1944 (R. B. p. 10).

Similarly, appellant wishes to refute the erroneous assertion made in footnote 8, page 10 of appellee's brief. Contrary to the government's assertion, no agent testified in detail, or at all, as to specific facts and figures disclosed by their investigation and audits against appellant, and appellant's counsel did not cross-examine a single agent at all, let alone at great length, as is asserted in such footnote [Tr. pp. 1014; 1090; 1193].

Appellant examined one government agent, J. Bryant Eustice, on *voir dire* only [Tr. pp. 552-559; 567-584].

Appellee in that portion of its brief devoted to its argument respecting this appellant and designated Section B (R. B. p. 35), purports to briefly restate the facts therefore more fully stated by it. Such purported brief restatement of "facts" will be discussed by appellant in his consideration of that section of appellee's brief.

POINT I.

Appellee at the outset of its discussion of the first point raised by appellant asserts (R. B. p. 35) that appellant's argument that the evidence falls far short of the minimum necessary to sustain the judgment against him, is based upon an examination of "certain bits of evidence selected by him." This assertion by appellee is made in absolute disregard of the known and obvious fact that appellant examined and evaluated every pertinent bit of evidence offered against and for him.

What has heretofore been said about the "Statement of Facts" as such, presented by appellee, applies fully to the purported restatement thereof presented as part of its argument. We deem it necessary to make only the following additional observations:

There is not a scintilla of evidence that appellant "*collected extra or over-payments in cash,*" or "computed the weight multiplied by 3¢," and the transcript references cited in support of such statements [Tr. pp. 429-431; 434-435], do not support the statement so made (R. B. p. 36). Once more counsel for the government bloated the record by the addition of the symbol "¢," to accompany the unexplained figure "3," as well as by supplying the aforementioned phrases.

Similarly, there is no evidence in the record against appellant of any discussion by him of any entries on the books and records of Acme Meat Co. with any agent of the Bureau of Internal Revenue (R. B. p. 36). The record reveals that agent J. Bryant Eustice was the only witness from whom testimony respecting entries on books and records was sought to be elicited, and that he was

not permitted, upon objection, to testify thereto [Tr. pp. 875-876; 879-883].

Again, there is not a solitary particle of evidence that appellant's bank records disclosed certain or any of his income for 1944 (R. B. p. 37), nor do appellee's transcript references support its contrary assertion [Tr. pp. 372-375; 380-387; 515; 554-555; 557-560; 568-571].

Appellee further states (R. B. pp. 37-38):

"As a result of their examination of all available books and records, other data introduced in evidence at the trial, bank records, and material, both written and oral, furnished by Himmelfarb, the agents of the Bureau of Internal Revenue found that Himmelfarb received considerable income in 1944 over and above that reported by him on his income tax return for that year."

Appellee cites in support of such statement pages 954-955 of the transcript. Appellant again urges this court to examine the cited portions of the record. Such examination will establish that the aforequoted statement is wholly without support, and for the convenience of the court appellant has reproduced in Appendix C hereof such portion of the transcript, including for the sake of completeness, the page preceding as well as the page succeeding the two pages cited.

It will be noted from the cited portion of the record that the witness J. Bryant Eustice was asked if he had determined whether or not, on the basis of the investigation made by him, there was any additional income for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on his income tax return for

that year. The answer of the witness to that question was "yes" [Tr. pp. 953-954].

The entire substance of that question and answer was that Mr. Eustice, on the basis of his investigation made a determination as to whether or not there was any additional income for appellant for the year 1944 over and above that reported by him. Such question and answer does not constitute a statement or declaration by Mr. Eustice respecting what such determination was; whether he had determined that there was such additional income or whether he had determined that there was no such additional income; nor did any other witness testify, nor was there any evidence introduced at any time establishing that there was any such additional income.

It will be observed that in the interim between the posing of the question and the reply thereto by the witness J. Bryant Eustice, an objection was made to such question, in the course of which discussion the court said:

"The objection will be over-ruled and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question."

Thereupon, Mr. Strong, counsel for the government, said: "I will incorporate that language into my question, if I may," which statement by Mr. Strong is immediately followed by the answer of the witness.

The answer, of course, is and can only be a reply to the question theretofore asked of the witness and then pending. The question was not and cannot be deemed to have been changed to some other nebulous, indefinite and

unknown question by the incorporation in the pending question of a statement by the court made in explanation of the reason or basis for his ruling.

It will be noted, too, from the cited portion of the transcript [Tr. pp. 954-955] that the undisclosed determination the witness Eustice did make was based upon "his investigation" and was not "*the result of their examination of all available books and records, other data introduced in evidence at the trial, bank records, and material both written and oral, furnished by Himmelfarb.*"

The word "considerable" appearing in the aforequoted paragraph from appellee's brief is another wholly gratuitous contribution to the record by the author of such brief. Although appellee in such paragraph uses the word "agents" in its plural form, no agent, excepting J. Bryant Eustice, who is wholly and completely singular, testified regarding any finding or determination respecting appellant's income for the year 1944, and he, as just pointed out, merely stated he had made a determination, but never disclosed what finding he made or what his determination was.

The government argues (R. B. p. 38) that the verdict of the jury in and of itself establishes that the jury disbelieved and rejected appellant's contentions, and found as a fact in accordance with the charge brought against appellant which the jury was privileged to do on the basis of the facts before it and permissive inferences therefrom. This would appear to be begging the very question sought to be refuted by the government in its Point I, namely, that the evidence against appellant is manifestly insufficient to support the verdict of the jury,

and such verdict and the judgment entered thereon, are contrary to both the evidence and the law.

The verdict of the jury in this case, if it demonstrates anything at all, demonstrates:

(1) That it was impossible for the jury in this case to segregate the evidence admitted against Sam Ormont only from the evidence admitted against appellant, and in its deliberations to weigh the evidence and to determine appellant's guilt solely upon the evidence admitted against him;⁸

(2) That the jury was misled into considering evidence not in the record against appellant by the argument of counsel for the government predicated upon evidence in the record only against appellant's co-defendant.

(3) That eradicable prejudice was aroused in the jury by the repeated references counsel for the government made in his argument to the jury respecting "extra money, side money, overcharges," of which there was no evidence in the record, as well as references to unrelated offenses and other matters dehors the record, all as pointed out in Appellant's Opening Brief (O. B. pp. 50-61).

⁸Appellee (R. B. p. 4, n. 3) called the attention of this court to the fact that "appellants" at no time made any motion for separate trials upon the income tax charges. This court should further be advised that counsel for appellant herein, and who was his counsel in the trial of the case below, was substituted as such counsel approximately five days before the trial and found himself immediately confronted with the motion of the government to consolidate the trial of this case with another action then pending against appellant, and which he was compelled to resist, as well as with the necessity of preparing for the trial of this case within that extremely short period of time. Under these circumstances appellant can hardly be charged with any failure to move for a separate trial. [Tr. pp. 1360-1361.]

The constant reiteration by the government of its bald conclusions that appellant "should not now be permitted to escape the consequences of his deliberate attempt to defraud the United States," that "his guilt of the offense as to which he was convicted below, is clear," that "this court should not render any aid to so gross and wilful a violator of the law," surely cannot and will not suffice to supplant a complete lack of evidence and a gross deficiency of the record.

POINT II.

Appellee makes no answer to appellant's second point that the trial court erred in denying appellant's motions for an acquittal of the offense charged against him in Count II of the indictment, made at the close of the government's case, and at the close of all of the evidence, other than to assert that appellant's second point is governed by its first point.

The lack of any other and further answer by appellee apparently stems from the previously admitted fact that the government has no quarrel with the law relied upon by appellant (R. B. p. 39).

POINT III.

Appellant's Point III is that the trial court erred in admitting over appellant's objection Exhibits 35, 36A, 44, 45, 50A and 50B, and in denying appellant's motion to strike from the record Exhibits 32, 34, 35 and 36A.

Appellee in his Point III, subdivision A (R. B. p. 40), discusses Exhibits 32, 34, 35 and 36A, which comprise the bank records.

Appellant in his Opening Brief advanced a number of tenable contentions, supported by numerous, and respectable authorities that prejudicial error was committed in the admission of said exhibits in evidence over objection, and in refusing to strike same from the record upon motion therefor (O. B. pp. 42-47).

Appellee's sole and somewhat complacent answer consists of:

(a) the tacit confession that these exhibits introduced at the beginning of the trial "were to have been in part the basis of the government's agents testimony" ("connected or tied up"), and plea by way of avoidance, that "upon the objections of Himmelfarb much of the testimony offered by the government in that connection was rejected by the trial court" (that these exhibits were not "connected or tied up");

(b) the pronouncement that "if the exhibits *on their face* even in part offer support for the verdict and judgment, they are unobjectionable, and if they offer no such support, their receipt in evidence, even if erroneous, was harmless error."

Counsel, in support of this latter statement, cites five cases, simply as "the *Oliver*, *Gusick*, *Capone*, *First National Bank*, and *Gleckman* cases, *supra*" (R. B. p. 40). These citations establish that appellee cites cases with the same reckless abandon and small regard for accuracy and preciseness as it exhibited, displayed and manifested in the presentation of its "Statement of Facts."

The first case, *Oliver v. U. S.*, 54 F. (2d) 48, did not concern itself with any question of the admissibility of bank records or any other evidence. The court, in its opin-

ion (p. 50), merely recited some of the evidence to determine whether the verdict is sustained thereby and in the course of such recitation referred to some bank records in evidence.

In the second case, *Gusik v. United States*, 54 F. (2d) 618, 619, the court, in considering the contention that bank records were not admissible in evidence because they neither proved nor tended to prove gross or net income, held that such bank records are admissible if properly established. This case, it will be noted, supports appellant's position that the bank records in the instant case were inadmissible because of the complete absence of any foundation therefor and relevancy to the offense charged.

The third case cited by appellee (R. B. p. 40) is "*Capone, supra.*" The only *Capone* case previously cited by appellee is *Capone v. United States*, 56 F. (2d) 927 (R. B. p. 21). That case in no way concerns itself with or even remotely touches upon the admissibility of bank records or any other evidence. However, the case of *Gusik v. United States*, 54 F. (2d) 618, 619, cited by appellee, cites *Capone v. United States*, 51 F. (2d) 609, and appellant presumes that appellee may have intended to refer to that *Capone* case rather than to the *Capone* case, 56 F. (2d) 927, cited on page 21 of its brief.

In *Capone v. United States*, 51 F. (2d) 609, 619, the court, in considering an objection to the admission of bank records in evidence, held that such records were sufficiently established by competent proof to justify their admission in evidence. This case, too, it will be observed, supports appellant's position that the bank records in the instant case were inadmissible because of the complete absence of competent proof to justify their admission in evidence.

No volume or page citation is given for the fourth case, which is simply cited as "*First National Bank*," and that case does not appear in the list of cases in the "Table of Authorities Cited" in appellee's brief (R. B. p. iii), nor does such case appear to be cited at any other place in appellee's brief. The only case counsel for appellant found, as the result of a diligent search, entitled *First National Bank v. United States*, or vice versa, was a case reported in 36 Fed. Supp. 229. That case, however, does not in any way remotely touch upon the point in question.

The final case cited by appellee is *Gleckman v. United States*, 80 F. (2d) 394. That case, too, is contrary to the contention of appellee and substantiates the position and contention of appellant herein. It was, in fact, cited by appellant in his Opening Brief (O. B. pp. 43-49).

It will thus be seen that of the five cases cited, one, "*First National Bank*," is so inadequately cited as to constitute no citation at all; another, "*Capone*," if incorrectly cited, substantiates appellant's contention, or if correctly cited, is entirely without applicability; a third, "*Oliver*," is completely without bearing on the point in question, and the remaining two, "*Guzik*" and "*Gleckman*," likewise support the position of appellant and are contrary to that of appellee in that they require bank records, to be admissible, be shown to be relevant by competent evidence.

Appellee in his Point III, subdivision B (R. B. pp. 40-41), discusses Exhibits 44 and 45, which are, respectively, an insurance policy and five monthly reports made in connection therewith. It is appellant's contention respecting these exhibits that they were completely irrelevant to the accusation that appellant violated Section 145(b) of the Internal Revenue Code, and the only apparent reason for

their introduction in evidence was to prejudice appellant (O. B. pp. 47-48).

Appellee makes a two-fold answer to these contentions. First, that Exhibits 44 and 45 were admissible as proof of appellant's status at the Acme Meat Co. to show his true income in 1944; and secondly, that inconsistent statements concerning his status bore upon the question of wilfulness and veracity. Appellee fails, however, to indicate how the insurance policies and monthly reports could in any way show appellant's true income for the year 1944, or to explain what bearing or effect said exhibits could have upon or with respect to appellant's income at all. Moreover, appellee's present answer that said exhibits were proof of appellant's true status is entirely inconsistent with its position at the trial of the case [Tr. p. 1465].

Furthermore, as heretofore pointed out in appellant's opening brief, not the slightest relevancy existed between these exhibits and the offense charged against appellant. Being wholly foreign to and disconnected with the payment of income taxes, said exhibits may not be considered in determining whether the acts of appellant respecting his income and income taxes were or were not wilful (O. B. p. 48).

Appellee in subdivision C of Point III (R. B. p. 41) discusses Exhibits 50A and 50B. These are identical statements of net worth of appellant as of April 30, 1945, which appellant contends are wholly irrelevant to the offense of which he stood accused (O. B. pp. 48-51).

Appellee's sole answer to this contention is that these statements were sent to the government agents "in support of Himmelfarb's efforts to save himself after his attempt to defeat and evade the payment of his correct tax

had been discovered.” The quoted statement, like so much of appellee’s brief, is wholly without support in the record.

The only testimony in the record respecting the circumstances of the preparation and delivery of these statements is that Mr. William S. Malin, appellant’s accountant, sent them to government agent Bircher [Tr. pp. 1112, 1152], and that appellant had signed Exhibit 50-B [Tr. p. 1112].

This witness, with respect to another exhibit, 50-D, did testify that it was prepared at Mr. Bircher’s request [Tr. pp. 1117-1118]. However, even with the aid of the testimony respecting an exhibit other than the two in question, no such statement as is made by appellee can be yeasted therefrom.

In support of its untenable position, appellee avers that the utility of net worth statements in the determination of a taxpayer’s income is too well established to require extensive discussion, and cites *Malone v. United States*, 94 F. (2d) 281, C. C. A. 7, cert. den. 304 U. S. 562. Appellant is unable to find in the cited case any use of or reference to a net worth statement, but assuming that it does or did, we are not in the case at bar concerned with any question of the utility of a net worth statement in the determination of a taxpayer’s income because no competent evidence was introduced to lay a foundation for or to establish some relevancy between the net worth statement and the charge made against the accused.

POINT IV.

Appellant in his Point IV urged that counsel for the government was guilty of misconduct in addressing improper argument to the jury, and devoted over thirteen pages to a detailed presentation of that point, citing numerous cases in support of his position (O. B. p. 50).

Appellee's answer may be summed up in its following two sentences (R. B. p. 42):

“Plainly, Himmelfarb here seeks to divert attention from his own patent guilt by pointing an accusing finger elsewhere. In this he fails.”

In subdivision A of Point IV (R. B. pp. 42-43), appellee seeks to justify the repeated interchange of the plural pronoun “they” for “he,” on the basis that such “change was necessitated by the limited admissions of certain of the evidence, due principally to Himmelfarb’s own objections, as well as Ormont’s, with which the record abounds.” This explanation indicates that the government has either misconceived or deliberately ignored the point made by appellant, namely, that counsel for the government by the recurring use of the plural pronoun “they,” repeatedly referred to and applied against appellant evidence which was not in the record against him, and if in the record at all, was only there against his co-defendant, Sam Ormont.

No aid or comfort can be gained by the government from the fact that the court properly limited the admission of evidence sought to be introduced by it. The argument of counsel for the government was incurably prejudicial for each of the reasons advanced in appellant’s Opening Brief (O. B. pp. 50-63).

In subdivision B of Point IV (R. B. pp. 43-44), appellee discusses appellant's contention that counsel for the government was guilty of misconduct in stating to the jury that two persons were accessible as witnesses to appellant, were not called by him, and inferring that such witnesses, if called, would have given testimony adverse and prejudicial to appellant (O. B. pp. 59-61).

Appellee labels the argument made by appellant in support of such contention as "slick" (R. B. p. 43), and asserts that appellant's counsel in his closing argument had called attention to the limited extent to which Malin testified, and first mentioned "Moody" in such manner as to create an inference that Moody may have been responsible for the contents of appellant's return. Appellee thus seeks to justify its argument to the jury.

A reading of the transcript at the very points indicated by counsel for the government will establish that with respect to William Malin [Tr. pp. 1501-1502], a witness for the government, counsel for appellant merely evaluated the full force and effect of this witnesses' testimony in the same manner as the testimony of every other witness who testified for the government was examined and evaluated. With respect to Mr. Moody, counsel for the appellant, in discussing Exhibits 4 and 5, the 1944 tax returns for appellant and his wife, stated that there appear thereon a statement "signature of person other than taxpayer or agent preparing return," "and a signature that appears to be W. Moody on that return which establishes it as someone other than defendant Himmelfarb who prepared that return." It can hardly be said that such argument by counsel for appellant sanctions the conduct of counsel for the government in stating to the jury in argument

that certain witnesses might have been called, or weren't called, or could have been called, and to infer that they were not called because their testimony would have been adverse to appellant.

The government argues, without the citation of a single authority, that there is nothing wrong in an *argument* to the effect that certain witnesses were available to defendant, but were not called by him to the stand (R. B. p. 44). The law is to the contrary (O. B. p. 60).

POINT V.

Appellant in his Point V (O. B. p. 65), contended that the trial court erred in refusing to charge the jury as requested by him in his proposed instructions, No. 17, 22, 25, 27, 29, 30 and 35.

In reply appellee states as a conclusion that instructions No. 17 (O. B. p. 64), No. 25 (O. B. p. 66), No. 27 (O. B. p. 67), No. 29⁹ (O. B. p. 68), No. 30 (O. B. p. 69), and No. 35 (O. B. p. 70), were either not proper statements of the law, or did not reflect the evidence in the case, and that Instructions No. 22 (O. B. p. 65) and No. 35 (O. B. p. 70), were given in another form (R. B. p. 45).

It would have been most helpful to appellant, and undoubtedly to the court as well, if appellee had pointed out in which respects the instructions so alluded to were not proper statements of the law, or did not reflect the evidence in the case, and had indicated which of the given

⁹Erroneously designated No. 28 by appellee (R. B. p. 45).

instructions covered in another form the refused instructions requested by appellant.

In the absence of such explanations and indications, there is nothing in appellee's Point V which requires answer.

POINT VI.

Appellant in his Point VI (O. B. p. 73), urged that the trial court erred in denying appellant's motions for an acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial.

Appellee declares in response thereto that appellant's contentions are without merit, that appellant was given a fair trial, and no error was committed requiring reversal of his judgment and sentence (R. B. p. 45).

It cannot be gainsaid that the record herein completely disproves the contentions of appellee and establishes appellant's position to be tenable.

SUMMARY.

Appellee, as if possessed of vast powers of prestidigitation, which are brought into play by the mere utterance of its conclusion that the evidence in this case presents a gross violation of the law by appellant, *ipso facto* dismisses and dispels all of the contentions advanced by appellant, all authorities cited in support of appellant's argument, and the host of errors committed in the trial of this action.

Not content, however, to rely alone upon such magical power, appellee calls to its aid the devices of distorting the facts, implication, innuendo, and embellishment of the record, in an effort to sustain its untenable position.

that certain witnesses might have been called, or weren't called, or could have been called, and to infer that they were not called because their testimony would have been adverse to appellant.

The government argues, without the citation of a single authority, that there is nothing wrong in an *argument* to the effect that certain witnesses were available to defendant, but were not called by him to the stand (R. B. p. 44). The law is to the contrary (O. B. p. 60).

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Not content, however, to rely alone upon such magical power, appellee calls to its aid the devices of distorting the facts, implication, innuendo, and embellishment of the record, in an effort to sustain its untenable position.

Counsel for appellant is constrained to disclose to this court his deep-seated belief that counsel for the government failed in their duties and responsibilities to the court, to this appellant, and to the government itself in the presentation of this case to this court, as reflected by its brief, which manifests a complete lack of regard for the seriousness of a criminal proceeding and the important significance of a brief therein.

Appellant having been neither fairly tried nor justly convicted, is entitled to a reversal by this court.

Respectfully submitted,

WILLIAM KATZ,

Attorney for Appellant, Phillip Himmelfarb.

Dated: July 19, 1948.

APPENDIX "A."

Portion of Reporter's Transcript designated by appellant in his "Designation of Record on Appeal" to be included in the record and comprising all of the pertinent evidence received against and on behalf of appellant.

(a) From Reporter's Transcript of Proceedings, May 21 and May 22, 1947:

- (1) Page 2, line 1;
- (2) Page 2, lines 13 and 14;
- (3) Page 4, line 16, to p. 5, line 19, incl.;
- (4) Page 11, line 20, to p. 12, line 1, incl.;
- (5) Page 23, lines 15-23, incl.

(b) From Reporter's Transcript, Volume I, of proceedings Friday, May 23, 1947:

- (1) Page 15, lines 4-22, incl.;
- (2) Page 25, lines 13-15, incl.;
- (3) Page 25, line 18, to p. 26, line 16, incl.;
- (4) Page 32, line 5, to p. 33, line 1, incl.;
- (5) Page 41, line 24, to p. 42, line 14, incl.;
- (6) Page 49, line 9, to p. 50, line 11, incl.;
- (7) Page 52, line 8, to p. 53, line 13, incl.;
- (8) Page 53, lines 15-25, incl.;
- (9) Page 54, lines 3-25, incl.;
- (10) Page 55, line 1, to p. 56, line 1, incl.;
- (11) Page 60, line 3, to p. 62, line 9, incl.;
- (12) Page 63, line 20, to p. 64, line 5, incl.;
- (13) Page 72, line 21, to p. 74, line 21, incl.;
- (14) Page 84, lines 18-25, incl.;
- (15) Page 89, lines 9-25, incl.;

- (16) Page 92, lines 8-17, incl.;
 - (17) Page 94, lines 3-8, incl.;
 - (18) Page 94, line 14, to p. 95, line 16, incl.;
 - (19) Page 96, lines 2-12, incl.;
 - (20) Page 96, lines 15-20, incl.;
 - (21) Page 97, lines 10-24, incl.;
 - (22) Page 98, line 1, to p. 103, line 22, incl.;
- (c) From Reporter's Transcript, Volume II, of proceedings May 26, 1947:
- (1) Page 107, line 13, to p. 109, line 18, incl.;
 - (2) Page 112, lines 1-19, incl.;
 - (3) Page 151, lines 10-14, incl.;
 - (4) Page 155, lines 7-11, incl.;
 - (5) Page 156, lines 1-2, incl.;
 - (6) Page 156, lines 15-20, incl.;
 - (7) Page 156, line 24, to p. 157, line 19, incl.;
 - (8) Page 158, lines 2-3, incl.;
 - (9) Page 158, lines 19-22, incl.;
 - (10) Page 159, lines 3-25, incl.;
 - (11) Page 160, lines 15-25, incl.;
 - (12) Page 161, line 12, to p. 164, line 5, incl.;
 - (13) Page 165, lines 2-5, incl.
- (d) From Reporter's Transcript, Volume III, of proceedings of A. M. Session of May 27, 1947:
- (1) Page 182, lines 3-21, incl.;
 - (2) Page 184, line 19, to p. 185, line 10, incl.;
 - (3) Page 186, line 9, to p. 187, line 2, incl.;
- (e) From Reporter's Transcript, Volume III, of proceedings of P. M. Session of May 27, 1947:
- (1) Page 252, lines 4-10, incl.;
 - (2) Page 259, line 13, to p. 260, line 17, incl.

- (f) From Reporter's Transcript, Volume IV, of proceedings of A. M. Session of May 28, 1947:
 - (1) Page 321, line 19, to p. 322, line 9, incl.;
 - (2) Page 322, line 19, to p. 324, line 25, incl.;
 - (3) Page 373, lines 1-19, incl.
- (g) From Reporter's Transcript, Volume VII, of proceedings of P. M. Session of June 4, 1947:
 - (1) Page 763, line 22, to p. 811, line 5, incl.
- (h) From Reporter's Transcript, Volume VIII, of proceedings of P. M. Session of June 5, 1947:
 - (1) Page 892, line 5, to p. 893, line 4, incl.
- (i) From Reporter's Transcript, Volume IX, of proceedings of A. M. Session of June 6, 1947:
 - (1) Page 985, line 4, to p. 986, line 9, incl.;
 - (2) Page 986, line 23, to p. 988, line 3, incl.
- (j) From Reporter's Transcript, Volume IX, of proceedings of P. M. Session of June 6, 1947:
 - (1) Page 1008, line 25, to p. 1012, line 10, incl.;
 - (2) Page 1013, line 1, to p. 1022, line 15, incl.;
 - (3) Page 1023, line 1, to p. 1031, line 11, incl.;
 - (4) Page 1032, line 2, to p. 1039, line 7, incl.;
 - (5) Page 1040, line 6, to p. 1041, line 1, incl.;
 - (6) Page 1061, line 21, to p. 1063, line 3, incl.
- (k) From Reporter's Transcript, Volume X, of proceedings of A. M. Session of June 10, 1947:
 - (1) Page 1083, line 13, to p. 1085, line 25, incl.;
 - (2) Page 1086, lines 5-21, incl.

- (l) From Reporter's Transcript, Volume X, of proceedings of P. M. Session of June 10, 1947:
 - (1) Page 1119, lines 7-10, incl.;
 - (2) Page 1149, line 4, to p. 1150, line 23, incl.;
 - (3) Page 1151, line 17, to p. 1152, line 5, incl.;
 - (4) Page 1153, line 1, to p. 1157, line 7, incl.;
 - (5) Page 1158, line 1, to p. 1161, line 6, incl.
- (m) From Reporter's Transcript, Volume XI, of proceedings of A. M. Session of June 11, 1947:
 - (1) Page 1201, line 1, to p. 1202, line 14, incl.;
 - (2) Page 1203, line 16, to p. 1204, line 4, incl.;
 - (3) Page 1205, line 1, to p. 1214, line 6, incl.;
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 - (6) Page 1330, lines 6-13, incl.;
 - (7) Page 1331, lines 7-11, incl.;
 - (8) Page 1331, line 23, to p. 1332, line 4, incl.

- (o) From Reporter's Transcript, Volume XII, of proceedings of A. M. Session of June 12, 1947:
 - (1) Page 1400, line 1, to p. 1403, line 25, incl.;
 - (2) Page 1419, line 24, to p. 1420, line 24, incl.;
 - (3) Page 1421, lines 1-15, incl.;
 - (4) Page 1421, lines 19-24, incl.;
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- (p) From Reporter's Transcript, Volume XII, of proceedings of P. M. Session, June 12, 1947:
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 - (2) Page 1432, line 24, to p. 1433, line 20, incl.;
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 - (6) Page 1456, line 25, to p. 1457, line 14, incl.;
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- (q) From Reporter's Transcript, Volume XIII, of proceedings of A. M. Session of June 13, 1947:
 - (1) Page 1538, lines 12-18, incl.;
 - (2) Page 1541, line 15, to p. 1542, line 10, incl.;
 - (3) Page 1543, lines 10-19, incl.;
 - (4) Page 1558, lines 11-24, incl.;
 - (5) Page 1562, line 5, to p. 1593, line 13, incl.
- (r) From Reporter's Transcript, Volume XIV, of proceedings of June 16, 1947:
 - (1) Page 1599, line 4, to p. 1613, line 12, incl.

APPENDIX "B."

Excerpts from Reporter's Transcript, Volume I, pages 427-435, inclusive:

(Testimony of Ernest Link.)

Q. You turned them over to him? A. Yes.

Q. Now, Mr. Link, did you ever see any other record of income of either Sam Ormont or Phillip Himmelfarb, or the defendant Acme Meat Company, besides the records—

The Court: The defendant Acme Meat Company?

Mr. Strong: Not the defendant; the defendant Sam Ormont, the defendant Phillip Himmelfarb and the Acme Meat Company, not a defendant.

Mr. Katz: I object to that, if the court please, on the ground that as to the defendant Himmelfarb there is no foundation laid, it assumes facts not in evidence, incompetent, irrelevant and immaterial, has no bearing on any issues in this case.

Mr. Robnett: I adopt the same objection for Mr. Ormont and add to it that it is asking for an opinion of the witness, to-wit, namely, whether it is a record of income.

The Court: Let me hear the question again.

(The question referred to was read by the reporter, as follows:

("Q. Now, Mr. Link, did you ever see any other record of [153] income of either Sam Ormont or Phillip Himmelfarb, or the Acme Meat Company, besides the records you have testified to here?")

The Court: There is no foundation for Himmelfarb. The objection as to Phillip Himmelfarb is sustained. The

objection is overruled as to the defendant Ormont. The witness may answer the question.

Do you remember it?

The Witness: Yes, I do.

No, I saw no records.

Q. (By Mr. Strong): Did you see anything? A. Yes.

Q. What? A. I saw the taking of money.

Mr. Robnett: I object to that and move to strike it out, if the court please, on the ground it is incompetent, irrelevant and immaterial, and doesn't show income.

Mr. Strong: He hasn't finished yet, your Honor.

The Court: Well, at the present stage of the answer it is a conclusion of the witness and is objectionable.

Q. (By Mr. Strong): Describe what you saw.

The Court: The answer may be stricken. The jury is instructed to disregard it. Obviously the defendant Sam [154] Ormont was in business and he had to take money from somebody.

Mr. Strong: My understanding is that the witness is testifying to money—

The Court: He just said he saw him take money. He hasn't testified to anything else.

Mr. Strong: Let me go back for a moment.

Q. Do you know the defendant Phillip Himmelfarb?
A. Yes.

Q. Did you see Mr. Himmelfarb on the premises of the Acme Meat Company at any time? A. Yes. [155]

Q. During what period? A. During 1944 and 1945.

Q. Will you state what you observed him doing?

Mr. Katz: That is objected to upon the ground that no foundation has been laid as to time and place.

Mr. Strong: The place is the premises, and the time is 1944 and 1945.

The Court: I take it that your question generally is as to what he was doing.

Mr. Strong: I want to show how he was—

The Court: I think it is a little too broad. What did you see him doing in 1944 and 1945 is liable to cover quite a variety of situations.

Q. (By Mr. Strong): Did you see Mr. Himmelfarb performing any work on the premises of the Acme Meat Company during 1944? A. Yes.

Q. And during 1945? A. Yes.

Q. What did you observe?

Mr. Katz: I object to that, if the Court please, as too indefinite; no foundation laid.

The Court: Overruled.

A. I saw Mr. Himmelfarb making out invoices to customers when they would come to the Acme Meat Company. He would [156] then compute on the machine in the office the amount due by the customer; then he would make after that computation another computation on the machine, a multiplication of the weight of that carcass of beef, or whatever it may have been, and enter this figure which was, as a rule, a computation—

Mr. Katz: That is objected to, if the Court please. The witness quite obviously is testifying to a conclusion, and to opinions on the part of the witness, without any foundation being laid therefor.

The Court: The question is all right to where he stated just now as a rule, and he would enter the computation. From there you can go on, but not anything else about your ideas as to why he was doing it.

The Witness: I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk? A. Of the desk of the Acme Meat Company, in the office.

Mr. Robnett: I move to strike out the answer as to Mr. Ormont upon the ground that it is hearsay and the opinion of the witness, and is not binding upon Sam Ormont.

Mr. Strong: We will tie it up, your Honor, with Sam Ormont.

Mr. Robnett: It is incompetent, irrelevant and immaterial. [157]

The Court: That was at the Acme Meat Company?

The Witness: Yes.

The Court: There is testimony in the record that the defendant Sam Ormont owned the Acme Meat Company in 1944. The objection will be overruled as to both defendants.

Q. (By Mr. Strong): Did Mr. Himmelfarb work at the Acme Meat Company?

Mr. Katz: I object to that as calling for the conclusion of the witness.

Q. (By Mr. Strong): State, if you know, what he did.

The Court: Do you withdraw the last question?

Mr. Strong: I withdraw it, to save time.

The Court: I thought you just asked him what Mr. Himmelfarb did down there, and he described it.

Mr. Strong: Then he went into some particular details. I would like to know what the defendant did.

The Court: Did you see him do anything else other than what you have just got through describing? A. Yes.

The Court: He may express his conclusion generally. Himmelfarb, was he down there in connection with the company in some way or another?

The Witness: Yes.

Q. (By Mr. Strong): In what way?

The Court: If you know. Do you know? A. He was selling beef and other meat cuts to the trade.

Q. (By Mr. Strong): For the Acme Meat Company? A. For the Acme Meat Company.

Q. As an employee?

The Court: Do you know whether or not he was an employee or one of the owners, or how he was connected? Do you know that? A. What is that?

Q. Whether or not he was an employee or otherwise connected with the company? The answer to that is yes or no? Do you know it? A. I can say yes and no, because I know two sides of it.

Q. You know two sides? A. Yes.

Q. What I am trying to get at is, when I asked you if you know, if you know it of your own knowledge, or if you just heard someone gossiping or not? A. No, it is definitely knowledge.

Q. You know that? A. Yes. [159]

Q. What was his relationship to the Acme Meat Company? A. He was a partner.

Q. He was a partner when? A. In 1944 and 1945.

Q. And 1945? A. Yes.

Mr. Robnett: I move to strike out the answer as a conclusion of the witness, if the Court please.

Mr. Strong. We have further proof.

The Court: That is a legal conclusion, whether a person is a partner, or is not. I think probably your objection is good as to both defendants, and the jury will be instructed to disregard the answer of the witness. I think perhaps more foundation can be laid.

The Court: Did you make out the payroll checks? A. No.

Q. Did you audit the payroll checks? A. Yes.

Q. You checked them in the book? A. Yes.

Q. Against the check books? A. Yes.

Q. Were they payroll checks to Phillip Himmelfarb? A. Yes. That's why the answer was yes and no.

Mr. Strong: If your Honor please, I started this to get Mr. Himmelfarb into the picture, but I have forgotten what I was getting him into. The question I asked was sustained as to Mr. Himmelfarb, because he was not in the picture. May I have the question read?

(Record read by the reporter.)

The Court: You had better ask another question. What you are trying to find out is the connection of Himmelfarb with the Acme Meat Company?

Mr. Strong: For a purpose. We will leave that for the time being.

Q. These entries which you discussed, which you saw Mr. Himmelfarb making on the sheets of paper, was it—

A. It was a list, yes.

Q. Did you ever see Mr. Himmelfarb receive any sums of money in connection with the sale of meat, which he entered on those sheets you have described?

Mr. Katz: I object to that, as a conclusion of the witness; incompetent, irrelevant and immaterial; no foundation laid.

Mr. Robnett: It is incompetent, irrelevant and immaterial as to Mr. Ormont. There is no connection between Mr. Ormont and Mr. Himmelfarb shown here except as an employee.

Mr. Strong: I don't know that it is shown except as an employee. [161]

Mr. Robnett: It is shown he received employee's checks.

The Court: That is the record up to now.

Mr. Strong: It shows the receipt of those checks by him.

The Court: Payroll checks. Let me hear that.

(Record read by the reporter.)

The Court: The objection is overruled as to both defendants.

A. Not in connection with that list.

Q. (By Mr. Strong): What did you observe in connection with that list? A. I saw on the list the names of customers and the amounts placed opposite those names of the customers. Sometimes they were written in the handwriting of Mr. Himmelfarb, and sometimes in the handwriting of Mr. Ormont. Some of them were marked "Paid" and crossed out; some of them were left open, and not crossed out.

Q. Did you record any of those amounts on those sheets into the records and books of the Acme Meat Company?

Mr. Katz: Objected to as to the defendant Himmelfarb. It is incompetent, irrelevant and immaterial. The books and records are the best evidence.

Mr. Strong: We don't have them.

Mr. Robnett: We join in the objection.

The Court: Objection overruled.

Q. Did you record any of the amounts from that list you [162] have spoken of into the books and records which you kept of the Acme Meat Company? A. No.

Q. (By Mr. Strong): With reference to Mr. Himselfarb—

The Court: Did you ever examine that list? A. That one time.

Q. One time? A. Yes.

Q. You say there were names of people on the list? A. Yes.

Q. And figures? A. Yes. I had half an hour's time to study it.

APPENDIX "C."

Excerpt from Reporter's Transcript, Volume III, pp. 953-956, inclusive:

(Testimony of J. Bryant Eustice.)

Q. Is that the only page? A. Just the one page.

The Clerk: We have a 40-A, your Honor.

The Court: 40-B. You said Mr. Berlin was there. The [816] bookkeeper's name is Link, isn't it?

The Witness: The first bookkeeper's name was Link, and Mr. Berlin was bookkeeper at the time I made the audit.

Q. (By Mr. Strong): Looking at Government's Exhibit 40-B for identification, will you state whether that is the transcript which you made of the books and records of the Acme Meat Company, as you just testified? A. Yes, sir, it is.

Q. Do you have the books and records at the present time? A. No, sir.

Q. Where did you last see them? A. At the office of the Acme Meat Company.

Q. Will you take the income tax return of the defendant, Phillip Himmelfarb, for the year 1944? A. What number is that, please?

The Court: 4. A. I haven't got it.

Q. You have it now? A. Yes, sir.

Q. You have already testified as to what books and records you used in connection with your examination of the return for the year 1944, of Himmelfarb, is that right? A. Yes, sir, I have.

Q. Now, on the basis of the investigation which you made, [817] as you have heretofore testified, did you determine whether or not there was any additional income

for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on the income tax return of Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please. No foundation has been laid; it is incompetent, irrelevant and immaterial, and has no bearing upon any issue in the case. It calls for the conclusion of the witness; calls for hearsay; assumes facts not in evidence. With respect, if the Court please to the matter of that transcript, we object to the use of it as being a hearsay record of a hearsay record.

The Court: Let me hear the question again, will you, Mr. Reporter?

(Question read by the reporter.)

The Court: That calls for his conclusion. This witness is offered as an expert.

Mr. Strong: May I submit that these are questions which were asked as to the other defendant?

The Court: He did not object.

Mr. Strong: This is just preliminary.

The Court: The objection will be overruled, and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question. [818]

Mr. Strong: I will incorporate that language into my question, if I may.

The Witness: The answer is yes.

Q. Will you take up the summary of adjustments which you have there, and turn to the page with reference to Phillip Himmelfarb for the year 1944? A. Yes, sir.

Q. And the income tax return for Phillip Himmelfarb for the year 1944?

Mr. Katz: If the Court please, with reference to that summary, I believe that is a matter that was gone into before. It was based upon the working papers that had been excluded, insofar as used in 1941 [*sic.* Ex. 41], which was established to be inaccurate, was prepared by others, and is not verified, and is based upon oral statements from persons that are not before this court, and based in part upon documents, and papers that have not been brought into this court. I believe that the summary is subject to the same infirmities as the working papers, and I object to it upon those grounds.

Mr. Strong: The witness testified that he did not use 1941 [*sic.* Ex. 41].

The Court: That he did not use the working papers?

Mr. Strong: That's right.

The Court: He has testified he did not use the working papers in making his calculations in relation to Phillip [819] Himmelfarb for 1944 income.

Mr. Katz: The preceding question, if the Court please, was upon the basis of the investigation he made he came to a determination with respect to the income tax. The investigation consisted of the information contained in his working papers, which this Court previously distinguished. He said he did not necessarily rely upon, but did use it.

Mr. Strong: That is anticipating what the basis is. We will show what the basis is, as we go along. The witness has already testified that in making up his opinion as to what the additional income is he relied upon the income tax return for the year 1944, his bank records, which are here, and upon other documents and the books and

records of the Acme Meat Company, and he specifically pointed out he did not rely upon 1941 [*sic.* Ex. 41].

The Court: And whatever information was contained therein. However, he did get that information, and gave consideration to it in his investigation.

Mr. Strong: And rejected it.

The Court: He said that he rejected it; but he gathered the information. He has the information there concerning the man's bank account. He used that to verify certain items, didn't you—the information you had on your working papers?

The Witness: No, not to verify any items, which I made adjustments on. [820]

The Court: He says any items he made adjustments on. He had to verify the source of income, so he had to take that into consideration.

Mr. Strong: This is the same problem we had at the outset of the trial.

The Court: And we are just about in the same place to.

Mr. Strong: Do you mean as to a recess?

No. 11666

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT ORMONT'S REPLY BRIEF.

DALY B. ROBNETT,

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1007 Spring Arcade Building, Los Angeles 13,

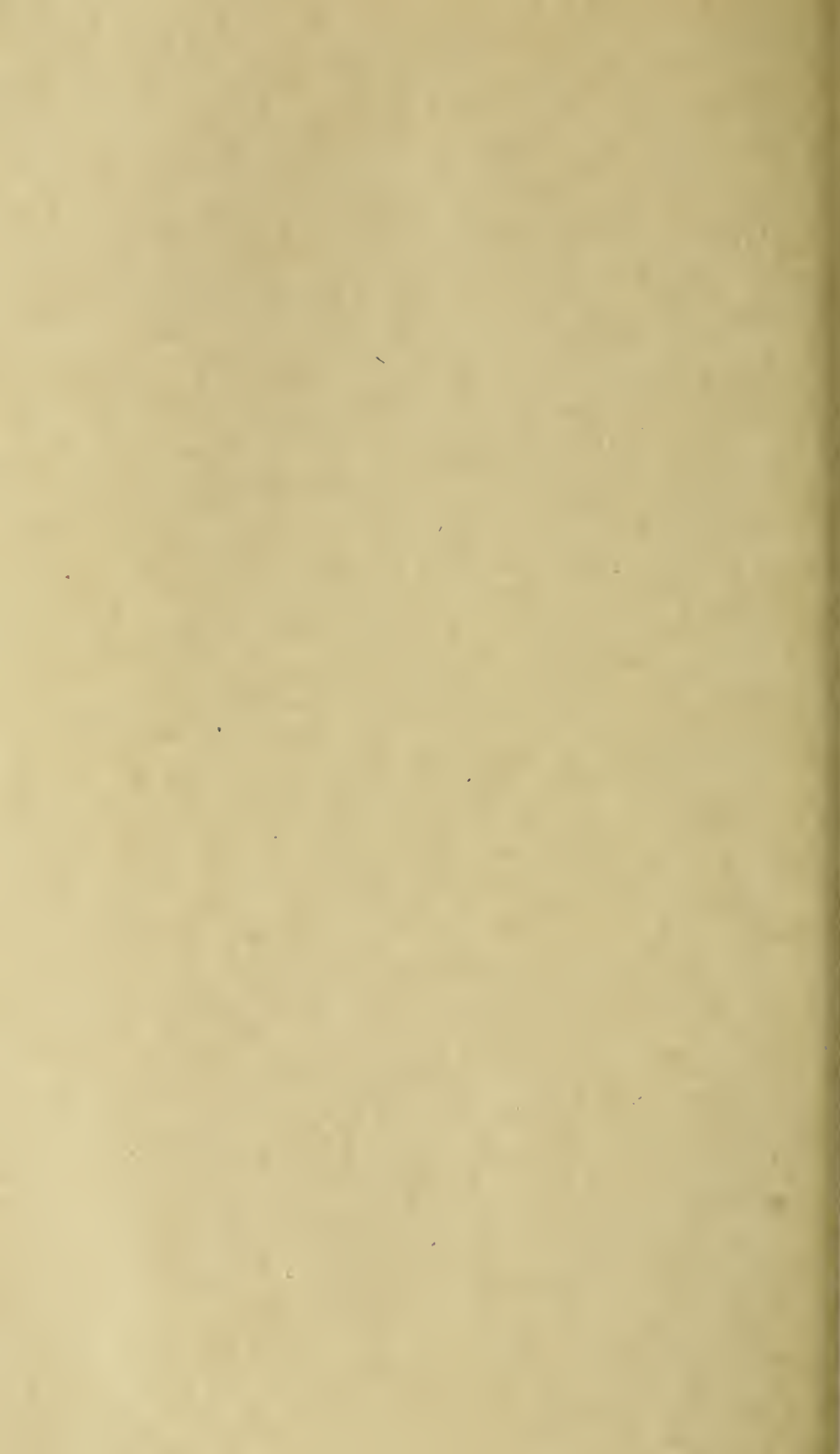
Attorneys for Appellant, Sam Ormont.

FILED

JUL 29 1948

JUL P. O'BRIEN,

CLERK



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No. 11666

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT ORMONT'S REPLY BRIEF.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

Appellee's brief fails in general to answer most of the errors set forth in appellant's opening brief, but consists of a lot of mis-statements of the facts, which are certainly intended to prejudice this Court, and we feel that those mis-statements require some answer, and we wish to take them up under the numbers of specifications of errors assigned by appellant. All italics will be ours.

ERRORS NUMBERS 5 AND 6.

Defendant's Motion for Immunity Should Have Been Granted.

Appellee, in its brief, pages 22 and 23, endeavored to brush aside this error by claiming that the examination of the appellant, Ormont, before the Grand Jury had nothing to do with this income tax prosecution in this case, and states that nothing in the instant case relates to over-payments by Ormont to anyone else.

The testimony of appellant before the Grand Jury is set forth in full [R. Vol. I, pp. 214-236, inclusive] and in substance the appellant was interrogated at great length as to "extra charges," which he paid for slaughtering cattle during the year 1944 [R. 215]. He testified that these "extra services" or charges, during the year 1944, were between Six Thousand Five Hundred Dollars (\$6,500) and Seven Thousand Dollars (\$7,000) [R. 222]. That all these charges were entered upon his books [R. 227].

Government witness, Ernest Link, testified he made appellant, Ormont's, income tax returns from the books [R. 465].

Profit or Income.

He was also questioned concerning the *profit* he made [R. 230, 233, 235].

Appellee on page 23 of its brief says:

"In fact any over-payments which he made, tended to reduce his true gross income which he is charged with having under stated."

This is a fallacy. The Government in its investigation before the Grand Jury, was claiming that these over-

payments were illegal, and as a result of the testimony of appellant, actually indicted the ones to whom such over-payments were made on the ground that they were illegal, and the defendants in that indictment entered pleas of guilty [R. 204].

It follows that if such “over-payments” were in violation of the O. P. A., the appellant had no legal right to put them on his books as part of the cost and thereby reduce his true gross income, but would have been liable for an income tax on such over-payments and subject to indictment under the Internal Revenue Code, which is the very code and law under which the indictment in the case at bar was found.

See:

Research Institute of America, Federal Tax Coordinator, Vol. I, p. 4124 under D-61, citing income tax, Office Decisions, 3724, 1945, 60;

United States v. Schenck, 126 F. (2d) 702, in which certiorari was denied, 316 U. S. 705, and in which case the Court held that the claim of willfully attempting to evade income taxes may be committed *by taking fraudulent or illegal deductions* from gross income, as well as fraudulently failing to report income receipts.

Under the law of immunity, it is not necessary that the Grand Jury be investigating the offense for which the witness is eventually charged, but as shown by the authorities cited by appellant's opening brief, page 101:

“It is sufficient if there is a law creating the offense under which the witness may be prosecuted.”

The law of immunity exempts him for criminal prosecution "from *any offense* that may be disclosed as a consequence of his examination." Immunity, to be of any effect, must be co-extensive with the constitution and *must protect the defendant from any prosecution for any offense* that may be disclosed as a consequence of his examination.

See:

Counselman v. Hitchcock, 142 U. S. 547;

Boyd v. United States, 116 U. S. 616;

United States v. Weinberg, 65 F. (2d) 394;

U. S. v. Andolschek, 142 F. (2d) 503 (C. C. A. N. Y.).

It makes no difference whether defendant's testimony was negative or affirmative, since it was possible that the questions might have brought forth incriminating answers.

See:

United States v. Armour and Company, 64 Fed. Supp. 855, and authorities cited;

U. S. v. Andolschek, *supra*.

It should be noted that the testimony of appellant before the Grand Jury was on October 10, 1945 [R. 214], and this was several months after the Revenue Department had started its investigation of appellant's income taxes, which, according to witness, Donald Burcher, commenced about the 23rd day of May, 1945. [R. Vol. III, pp. 1134-1135.] Appellant was not advised of his constitutional rights to refuse to testify before the Grand Jury and did not waive his right to immunity. In fact, as shown on

page 104 of our opening brief by a quotation from the Record, page 276, Mr. Strong stated that *The witnesses would not sign a waiver of immunity*. This entire case against appellant was based upon alleged violation of the O. P. A. regulations, and appellant's income therefrom, as is well illustrated by appellee's brief on page 7.

Where a defendant is subpoenaed and put under oath by a prosecution, the prosecutor in so doing knows that if he asks any questions, the answers to which might to any degree be incriminating, that he is exchanging immunity for testimony and whether such answers are incriminating is not the test. We quote from the case of *U. S. v. Monia*, 317 U. S. 424, at page 430:

"The legislation involved in the instant case is plain in its terms, and, on its face, means to the layman that if he is subpoenaed, and testifies, he is to have immunity. Instead of being a trap for the government, as was the original act, the statutes in question, if interpreted as the government now desires, may well be a trap for the witness. Congress evidently intended to afford government officials the choice of subpoenaing a witness and putting him under oath *with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testifies*, or retaining the right to prosecute by foregoing the opportunity to examine him."

We call the Court's attention also to the case of *Armour and Company v. U. S.*, 64 Fed. Supp. 55, which, although a District Court opinion, is nevertheless very well reasoned and based upon the leading authorities which are cited therein and quotations taken therefrom, which apply to the case at bar.

Government Put Evidence Before Jury of “Over-Payments.”

Appellee claims there was nothing in the instant case relating to over-payments to anyone. We quote the following from the testimony of Samuel J. Phoebus [R. Vol. III, p. 1025] in which he is testifying as to a conversation with the defendant May 18, 1945, and says:

“We asked him if he had ever been required to pay to other people, amounts which he had not recorded on his books, and he said ‘No.’ We questioned him a little further and finally he said, ‘Yes, *there were some amounts that were paid over* that are on the books.’ ”

Appellant’s counsel immediately moved to strike out the conversation and the Court said:

“That all goes to the general subject matter. The objection is over-ruled.”

The foregoing took place on June 5, 1947 [R. Vol. III, p. 1006], *five days later*, to-wit, June 10, 1947, at the afternoon session of Court [R. Vol. III, p. 1215], appellant’s counsel made another motion to strike said evidence and conversation of May 18, 1945, and then the Court granted the same. [We quote from R. Vol. III, foot of page 1246]:

“The Court: All the motions to strike are denied, except your first motion to strike the testimony of the Witness, Phoebus, of the conversation on May 18, which is granted.”

This last motion and the order granting the same, were outside the presence of the jury. And the next day, namely June 11, 1947, the Court merely instructed the

jury that all conversations by Mr. Phoebus with the defendant, Ormont, prior to May 24, were stricken from the record, and the jury was instructed to disregard them. The Court did not advise the jury of the substances of the conversations so stricken, although the witness had testified to several conversations, including some that were not stricken, and it would have been impossible for the jury to have remembered the substances of those that were stricken, especially since this conversation had been allowed to remain in the minds of the jurors from June 5 until June 11, and this particular conversation had been emphasized to them as being proper, by the Court having denied the motion to strike the same immediately after it had been uttered, and this belated granting of a motion to strike the evidence, certainly did not erase from the minds of the jurors the impression the evidence had made thereon, as was said in the case of *People v. Bird*, 132 Cal. 261-264, with respect to such procedure:

“The practice, however, is one not to be commended, for there is inevitably some impression made and effect left upon the minds of the jurors.”

This is emphasized by the fact that Mr. Strong, the prosecuting attorney, and who, we understand, prepared appellee's brief, refers to this conversation that was stricken in said brief on page 5, at the foot of page 5, where he states:

“On May 18, 1945, the Federal Bureau of Internal Revenue made known to appellant the fact that their income tax returns for the calendar years 1942-1944,

inclusive, were under investigation, by requesting permission to examine appellant's books and records. Appellant thereupon immediately sought the advice of an attorney and an accountant, and upon their advice, filed jointly on May 24, 1945, a partnership return of income, showing additional, previously unreported income for the period from May 1, 1944 to April 30, 1945 in the sum of Seventy-One Thousand Three Hundred Eighty-Eight Dollars and Eighty-Four Cents (\$71,388.84)."

There is absolutely no evidence *in the record* of any such fact having been made known to appellant on May 18, 1945. This gratuitous statement by appellee's counsel could only find support in the conversation above testified to by witness, Phoebus, as of May 18, 1945, and which, as we have heretofore shown, was stricken from the record. In connection with this statement, we also wish to call the Court's attention to the fact that appellee's counsel further mis-states the facts by stating that appellant thereupon immediately sought advice of an attorney "and an accountant." There is nothing in the record that the appellant ever sought or employed the accountant. All that appears in the record is that an accountant by the name of Mr. William S. Malin was employed by an attorney by the name of Mirman. [R. Vol. III, pp. 1192-1194.] As to when appellant sought the advice of Attorney Mirman, there is absolutely no evidence. Counsel again mis-states that appellant employed said accountant. (Appellee's brief, p. 15.) The motion for immunity should have been granted.

Appellant Paid All Taxes on His Portion of \$71,388.84.

In connection with the above item of \$71,388.84 represented on Exhibit 6, it should be borne in mind that Exhibit 6 was a "joint venture" return for a "fiscal year," namely, May 1, 1944, to April 30, 1945, and that during the said fiscal year appellant filed, according to law, his estimate of his tax on his portion thereof and paid the same in conformity with the law. [R. Vol. III, pp. 1078-1079.]

Government's witness, Eustice, testified under cross-examination that this manner of accounting for and paying taxes on said income on the fiscal year basis yielded the government an over-payment of approximately Three Thousand Dollars (\$3,000.00) more income tax than the appellant would have been required to pay, had he followed the Government's system of accounting. [See: R. Vol. II, p. 861.]

Appellee Misstates Facts Concerning Invoices.

On page 7 of appellee's brief, we cite the following:

"In addition, certain sales and income from them in some instances were shown on invoices, but the invoices were not transmitted to the Acme Meat Company's bookkeeper by appellants, and as a result were not entered on its books, nor was the income included as part of the gross or net income for 1944 reported by appellants for income tax purposes on their calendar year returns [R. 414 ff]."

The foregoing is very misleading to the Court, to say the least, as it is not based upon a correct statement of the record. The alleged invoices, Exhibits 38 and 39, consisted of purported invoices, which witness, Link, stated he saw and were being used for scratch paper. All

these were 1942 invoices, and there is absolutely no evidence that they were not entered on the books. All the evidence in this connection was that by Mr. Link, that he never entered them, but he also testified that he never checked the books to see if they had been entered. We quote from Record Volume I, page 417, in reference to them:

“The Court: And they are all dated 1942?”

“The Witness: Yes.

“The Court: Did you check your books to see if you had any corresponding entries of cash sales for that year?”

“The Witness: No. I did not check them.

“The Court: You did not check 1942?”

“The Witness: I did not check those against those periods, no.”

Thus the appellee is trying to get before this Court the false impression that in 1944 (the only year involved on this appeal) there were sales and income and invoices not entered on the books, all of which is false, as there is no evidence of any 1944 invoices not entered on the books, and the appellant having been acquitted by the Court for the years 1942 and 1943, it is prejudicial misconduct for counsel to try to get these matters before this Court, and lends emphasis to our contention in our opening brief that counsel for the Government misled the jury with his arguments in which there were misstatements (see: appellant's opening brief, p. 140), and further lends support to our motion made after acquittal of the appellant for the years 1942 and 1943 to strike all of the testimony of the witness, Ernest Link, for the years 1942 and 1943 and which motion was denied. See our opening brief, page 130, *et seq.*

No Falsification of Records.

On page 8 of appellee's brief, they again assert that appellant deliberately falsified his records and books and later drew checks to cover up the falsification. This is not true.

During the trial, Government's counsel made a similar statement, and the Court immediately struck it out and told the jury to disregard it, and told counsel that it was not proper. [R. Vol. II, p. 504.] We have complained of Government's counsel's improper argument to the jury on this point also in appellant's opening brief, pages 140 and 141. On this very subject, it was established conclusively that the records were not "falsified" but were accurate, when the items were so added, because they had been actually paid out. We quote from Record Volume II, pages 471-472, referring to these items:

"The Court: That was a recorded increase in the amount of *money paid* for the purchase of cattle.

"The Witness: That is right."

On page 472, in speaking of adding the item on the books as additional cost, the witness said of Mr. Ormont:

"Answer: He made a check out for it.

"The Court: He made what?

"The Witness: He made a check out for that increased amount.

"The Court: *He actually paid the additional money.*

"The Witness: He paid the additional money with a check which was drawn.

“The Court: *He paid the additional \$3,000.00.*

“The Witness: *Yes.*

“The Court: *So that the books were accurate when it said that he spent \$3,000.00 more.”*

The checks were introduced in evidence, showing the payment of the exact amount, being Exhibits “B,” “C” and “D,” Mr. Ormont’s personal checks, totalling \$3,682.00; which, the witness, Link, finally said, was the amount he had in mind in his testimony. See Record Volume II, pages 486-487, in which the witness stated there were no other changes in the books, so that appellee’s counsel’s statement that appellant drew various checks to cover up his original falsifications is itself false.

Appellee makes note of the fact that all of appellant’s specifications of error are not argued in our opening brief, and further, that we simply took bits of testimony and excerpts from objections and rulings. An examination of our brief will show that we always quoted sufficient of the record to show the points specified as error, giving the reference to the page number of the transcripts as required by Sub-division D of Rule 20. See Third Supplement to O’Brien’s manual of Federal Appellate Procedure.

In many instances the objections or errors specified were obvious and a mere statement thereof and of the record was sufficient, in our opinion, without the necessity of indulging in an argument, to this Honorable Court, of the merits thereof.

Former Jeopardy (Specification of Error No. 4).

Appellee's counsel, on pages 18 and 19, makes note of the granting of the mis-trial and the excusing of the first jury, and connects that with the consent of Ormont's counsel that it was not necessary for the Court to call the jury back into Court to excuse them. We wish to emphasize to this Court that the Trial Court first granted the motion of defendant, Himmelfarb's, counsel to declare a mis-trial and excused the jury, and all that Ormont's counsel ever was asked to stipulate to, and did stipulate to, was that since the Court had so granted the motion in the absence of the jury, *that we would not require the jury to be brought into Court and formally dismissed*, but we were by no means thereby stipulating to its dismissal which had already been ordered. Appellee's counsel, on page 19 of the brief, quotes a portion of a stipulation, but do not quote the qualification thereto, appearing on page 241 of the record, where the Court said:

“Unless it appears obvious from the statement or objection that it applies only to one person, but such general motions or objections are made throughout the trial, will apply to both.”

Thus showing that where an objection obviously appears to be made for one person only, and where it is so specifically stated by the counsel making it, as was the case on the motion to discharge the jury made by Mr. Katz in behalf of defendant, Himmelfarb, only, that then it should not apply to defendant, Ormont. Referring to the matter of dismissal of the first jury, appellee's counsel says that the Judge pointed out to Ormont that it was his understanding that the motion had been “joined in by both defendants.” All that the Court said was, “I was *under the impresson* that the motion was made on behalf

of both defendants.” The record shows that when Mr. Katz addressed the Court, he said, “If the Court pleases, *this is a motion on behalf of defendant, Himmelfarb*, to dismiss the indictment. . . .”

And following the statement of his motion to dismiss the indictment, then said [R. Vol. II, p. 246], “Now I wish to make one other motion, if the Court pleases, and that is a motion to withdraw a juror and to declare a mistrial. . . .” (p. 257). Thus indicating clearly to the Court and to Mr. Ormont’s counsel that from the motion, it not only appeared “obvious,” as per the above stipulation, that it was only made for Himmelfarb, but it appeared specific that it was so made. But in any event, the Court in passing on appellant’s motion to dismiss for once in jeopardy, laid little, or no, stress on his impression as to whether the motion had been for one or both, and then immediately said:

“Even so, in considering the matter on the merits, I do not think the motion for once in jeopardy plea is well taken. While the jury was sworn, there was not even a witness sworn, no opening statement to the jury, and there was nothing that the jury could decide it on. . . .” [R. Vol. I, p. 304.]

Appellee, on page 20 of his brief, seeks to charge appellant, Ormont, or his counsel, with having created the situation resulting in the once in jeopardy, which is a distortion of the facts. Neither Mr. Ormont, nor his counsel, had anything to do with that situation. It was Government’s counsel, Mr. Strong, who had made a reference to another pending case, while the jury was being impaneled, and it was appellant, Himmelfarb’s, counsel, who, without Mr. Ormont’s or his counsel’s prior knowledge, raised the point and made a motion to declare a mistrial.

Defendant Has Vested Constitutional Right in the Jury as and When Duly Impaneled and Sworn.

Thus, as held by this Honorable Court in the case of *Conero v. U. S.*, 48 F. (2d) 69, there must be an absolute necessity before the Court is justified in discharging a duly impaneled jury.

We respectfully refer this Honorable Court to our argument and points and authorities on this plea of once in jeopardy in appellant's opening brief, pages 88-93 (not answered by appellee), and particularly call the Honorable Court's attention to the fact that appellant had a vested right in the first jury that had been so duly impaneled and sworn, and which was a constitutional right of which he could not be deprived without his personal consent. (Appellant's opening brief, p. 89.) (*People v. Schmitz*, 7 Cal. App. 330, at pp. 348-350.) His attorney, as such, had absolutely no authority, by stipulation or otherwise, to waive that constitutional right without express authority from appellant. (Appellant's opening brief, pp. 91-92.) Appellant's counsel in this case had no such authority and none is even indicated in the record, and that so-called stipulation could not be extended so as to preclude appellant from raising the plea of once in jeopardy, but such a stipulation could only be effectual for *ordinary procedural matters*. In this instance, however, the fact that appellant was present when Mr. Katz, who was not appellant's attorney, but was attorney for another defendant, was making a motion, certainly could not be extended over so as to even cause an inference to be

drawn that Mr. Ormont was, by his silence, bound thereby. As is laid down on page 386 of Volume I of Thornton on Attorneys at Law, where it is said, "An attorney certainly cannot bind his client by any unauthorized act, which amounts to a total or partial *surrender of his substantial right*," and is said in 3 Cal. Jur. 667:

"It is the general rule that an attorney cannot, by virtue of his general authority, *bind his clients by any acts* which amount to a *surrender* in whole or in part *of any substantial right*."

To the same effect, see:

2 Ruling Case Law, p. 995;

Wuest v. Wuest, 53 Cal. App. (2d) 339 at 345;

Spencer-Kennelly Ltd. v. Bank of America, 19 Cal. (2d) 586 at 593.

The foregoing California cases were civil cases, and it was held there that the attorney had no authority to "waive a substantial right of his client." In the *Wuest* case, the attorney had stipulated to waive findings, so that an appeal might not be taken from the judgment, and it was held that this was stipulating away a substantial right and was not binding. How much stronger should the rule apply in a criminal case such as this, and where, as here, the appellant had an absolutely vested right in jury that was selected and sworn?

Impanelment and Swearing of Jury Constitutes Jeopardy.

In addition to the authorities above cited and cited in our opening brief on this proposition, we wish to call the Court's attention to the following authorities:

People v. Hawkins, 127 Cal. 372;

Jackson v. Superior Court, 10 Cal. (2d) 350, 357;

Cooley's Constitutional Limitations, 6th Edition, 399;

People v. Schmitz, 7 Cal. App. 330;

People v. Young, 100 Cal. App. 18.

Court Virtually Amended Indictment (Specifications of Errors 1, 2 and 3).

Appellee, on pages 21 and 22 of its brief, in attempting to answer appellant's specifications of errors Nos. 1, 2 and 3, being the motion to dismiss the indictment, a motion for bill of particulars and motion for continuance (appellant's brief, pp. 22-23 and argument on which is presented on pp. 94-97) tries to justify the sufficiency of the indictment by saying that it was a standard indictment, which has been used in many cited cases. but in none of which is the "means" or "manner" of violation set forth. Whereas, in the case at bar the "means" and "manner" were specifically set forth, namely, that the evasion was committed by *filing an "income and victory tax return."*

Not only was this particular language of the indictment questioned in appellant's written motion to dismiss [R. 27], prior to plea, but also in the motion for bill of particulars [R. 58-59] and also in the oral objection to the

introduction of any evidence based on all of the grounds set forth in the written motion for a bill of particulars, and a written motion to dismiss [R. 326] and again when the prosecution opened its case and offered in evidence Exhibit No. 3 (Sam Ormont's income return for 1944). Appellant's counsel specifically objected to the introduction thereof on the ground of a *variance* between the indictment and the exhibit offered, and emphasized that the indictment was for an income and victory tax, whereas, the exhibit covered only income tax [R. 335-337].

The Trial Court ruled against all these matters on the ground that the words "victory tax" were surplusage. Appellee, in its brief, says, page 21, "While it is true that in Count 1 the return was described as an 'income and victory tax return,' it is clear that the words 'victory tax' are mere surplusage. There was no 'victory tax' for 1944 and no return for such a tax." Such a contention by appellee is no legal answer to the errors complained of. The indictment was found by the Grand Jury in the exact words appellee admits, and that was the charge which appellant was to meet and the prosecution could not ignore the words "victory tax return" as alleged in the indictment, but was compelled to either prove that indictment as found or none at all, just as was held by this Honorable Court in the case of *Carney v. U. S.*, 163 F. (2d) 784.

The indictment in that case as it came from the Grand Jury charged in the first count that defendant, "Made, forged and counterfeited K-14h" gasoline ration coupons. This Honorable Court, in that case, said, on page 790, "There were never any original K-14h gasoline ration coupons." Appellee says that in 1944, there was no "victory tax." The Trial Court permitted the indictment in that case to be amended by changing the "K-14h" to

"A-14h," and this Honorable Court reversed the case on the ground that the Government was bound by the Grand Jury's indictment and that the Court could not amend the same. This Honorable Court said, on page 790:

"The judgment in Count 1 of the indictment as made by the Grand Jury was that the defendants defrauded the United States *by forging and counterfeiting 'K-14h' gasoline ration coupons*. There were, however, original 'A-14h' coupons. It may well be that the Grand Jury intended to use the letter 'A' instead of 'K,' but neither the Trial Court nor this Court can speculate on the intent of the Grand Jury. Because it is probable that 'K' was inadvertently used instead of 'A' does not authorize any Court to proceed under such assumption. The conviction and judgment as to Count 1 must be reversed."

So, the mere fact that there was no "victory tax" for 1944 does not change the fact that the Court could not disregard the indictment, and when the prosecution's attention was called to this fact, its only procedure would have been to have re-submitted the matter to the Grand Jury and let that body find the new and properly drawn indictment. The judgment in that case was that, as this Court said, the defendants defrauded the United States and then alleged the "manner" in which that defrauding was accomplished, namely, the kind of an instrument that was used. As this Court says, that such alleged defrauding of the Government was "by forging and counterfeiting 'K-14h' gasoline ration coupons." Had the Court, in that case, instead of amending the indictment, permitted the prosecution to introduce in evidence "A-14h" coupons instead of "K-14h" coupons, there would have

been a variance. So in the case at bar, the Court allowing the prosecution to introduce a different instrument, namely, Exhibit 3, rather than the one charged in the indictment certainly constituted a variance. This is well demonstrated by the case of *Dodge v. U. S.*, 258 Fed. 300, 305, which case this Honorable Court relied upon in the *Carney* case and in which case certain words were by the Court struck from the indictment as “surplusage,” without any objection. Nevertheless, the Appellate Court held that such error was of the most serious kind, and that it was fatal to a verdict upon that count. To the same effect:

Ex parte Bain, 120 U. S. 1;

Steward v. U. S., 12 F. (2d) 524, decided by this Honorable Court;

U. S. v. Norris, 281 U. S. 619-623;

Edgerton v. U. S., 143 F. (2d) 697 (9th Circuit).

In this connection, based upon the foregoing authorities, we re-affirm that our specification of error No. 73 argued on page 83 of our opening brief and being an instruction given by the Court that the words “victory tax” in the indictment were surplusage, and may be disregarded, was well taken, and we submit that the motion to dismiss the indictment should have been granted, the objection to the introduction of Exhibit 3 should have been sustained, and all of those rulings were fatal errors. These acts of the Court were equivalent to amending the indictment by striking a part thereof.

Motion for Acquittal Should Have Been Granted Appellants. (Specifications of Errors Nos. 48 and 49. See Appellant's Brief Pages 125, et seq.)

For the same reasons given above, showing that the motion to dismiss should have been granted, and that the objection to the introduction of Exhibit 3 should have been sustained on the grounds of variance and that the instructions of the Court to the jury that they could disregard part of the indictment was erroneous by the same token the motion for acquittal on Count 1 should have been granted, as there was absolutely no evidence of the defendant ever having prepared and filed for the year 1944 *an income and victory tax return* as charged in the indictment, and which is charged therein as the means by which the appellant violated the law.

The Court Erred by Denying Defendant's Motion to Strike the Testimony of Witnesses Link and Eustice Pertaining to the Years 1942 and 1943. (Specifications of Errors Nos. 50 and 51, Appellant's Opening Brief Pages 130, et seq.)

Appellee's only answer to these motions and the authorities we cited in our opening brief is that they disagree and then state that because appellant was acquitted on the charges in the indictment for those two years, that he could not complain, and then appellee attempt, to show that that evidence nevertheless was received with relation to willfulness. The authorities cited do not sustain the appellee. The only time evidence of other crimes or similar offenses may be used to show willfulness is when such evidence of such other offenses is sufficient to satisfy the Trial Court that such other offenses have been proven. We went into the authorities in our opening

brief and showed that the Trial Court, in this instant, held that they had not been proven, and therefore acquitted the defendant; hence, the evidence was not admissible under any theory as to Count 1 and should have been stricken from the records before that count was submitted to the jury. Having left the evidence before the jury, it was used by the prosecution as the means of producing the verdict. This is demonstrated by the following argument to the jury made by the prosecuting attorney, in which we have assigned this error. In Record Volume IV, page 1466, counsel is arguing to the jury about Sixty-Three Dollars (\$63.00) interest *received in 1943* and says:

“Was that \$63.00 interest reported on the return where it calls for the reporting of interest in the year 1943? Just remember now, you are not trying it for 1943 only with reference to 1944, but on the element of willfulness whether he willfully, as charged in the indictment in 1944, attempted to defeat and evade a large part of his tax, you can take that into account too. It is another incident of concealment of something or other?”

And on page 1462, Government's counsel said:

“And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books, because, as he told you, he had never been given those invoices. And what did these invoices show, ladies and gentlemen, those invoices showed on their face—they were part of the exhibits; you can examine them—they showed on their face that the money shown on them was paid, the date it was paid and

it had Mr. Ormont's signature. That is some more money that isn't on the books, *some more money unreported*, some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont."

Those invoices are Exhibits 38 and 39 and were testified to by Mr. Link on pages 414, *et seq.*, and were admitted in evidence as part of the testimony of Mr. Link *for the year 1942*, as all of them were dated in 1942 and all his testimony with regard to the books and these exhibits had nothing to do with 1944, consequently, had our motion to strike his testimony for the years 1942 and 1943, been granted, such evidence and exhibits would not have been before the jury and counsel for the Government could not have argued, as he did, without going outside the record and here he indicates in his argument to the jury that they were unreported income implying that they were income for 1944. As to Mr. Eustice's testimony pertaining to 1943, Government's counsel, on pages 1476, *et seq.*, says,

"Well, *in 1943*, out of the \$12,000.00 he bought about \$8,000.00 worth of bonds. Remember that testimony, \$8,000.00 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference from that, that the unreported income, which Mr. Eustice claims this man accumulated during that year, wasn't really accumulated during that year, because he bought \$8,000.00 worth of bonds.

"Take the \$8,000.00 and then look at this schedule No. 42, which shows how many bonds were actually bought during *that year* and see if you don't find over \$50,000.00 worth of bonds bought *that*

year—\$50,000.00 worth of bonds—some such sum. *Just look at them.* They are enumerated on the schedule and it is in evidence.

“What is \$8,000.00 off that? It is \$42,000.00. Well, let’s assume he had \$8,000.00 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn’t change it a single iota. Not a single iota. Any explanation as to the money that was used to buy the bonds? No. Except some checks were shown here. Which of the bonds were bought with those checks. I can’t say. I don’t know.”

All of the foregoing, as is shown, pertained entirely to the year 1943 and to the large amount of bonds which were bought in that year and had absolutely nothing to do with 1944, and in addition thereto, is a gross misstatement of the record as we showed in our opening brief, page 139.

And in this same connection, the Trial Judge told the jury [R. Vol. IV., page 1449]:

“The case is now pending as against the defendant Sam Ormont as to Count 1 only, and as to defendant Philip Himmelfarb as to Count 2 only.

“Counts 3 and 4, those relating to the income tax return of the defendant Sam Ormont for the years 1942 and 1943, the Court has given a judgment for the defendant upon motion of his counsel. The evidence in the Record, however, which relates to the conduct of the defendant Sam Ormont during the years 1942 and 1943 was not stricken from the Record, but was left in the Record in order for you to determine whether or not there was a specific

intent and whether or not there was willfulness, as I shall define 'willfulness' to you, on the part of Sam Ormont to do the things which he is charged with having done, in Count 1, which relates to his indictment in 1944; and for that limited purpose only."

Appellee, in trying to justify its argument to the jury on page 32 of its brief, contends that appellant is giving a meaning to that argument which was not intended by the prosecutor. This is indeed a weak explanation, because if his argument was so confusing and ambiguous that his intent did not clearly appear therefrom, then it most certainly was erroneous.

Subpoena Duces Tecum Served on Appellant in Presence of Jury Was Violative of His Constitutional Rights (Specification of Error No. 52).

On page 33 of appellee's brief, appellee admits the error but tries to escape responsibility therefor by blaming the Trial Court. This matter arose in the following manner:

Prosecuting attorney was seeking to introduce evidence as to the contents of certain books and records of the Acme Meat Company *as against defendant Phillip Himmelfarb*. Objections were duly interposed by Mr. Himmelfarb's counsel and were sustained on the ground that the books and records were the best evidence, and we quote from the Record:

"Q. (By Mr. Strong): Would you look at the income tax return of Phillip (368) Himmelfarb for the calendar year 1944, which is Government's Exhibit 3, I believe, in evidence? A. No. 4."

Q. Exhibit 4—and also look at the income tax return of Mrs. Phillip Himmelfarb, which is Exhibit

5 in evidence. Will you state what the return of Phillip Himmelfarb shows as having been reported by Phillip Himmelfarb as his salary for the calendar year 1944? A. \$4500.00.

Q. Do you disagree with that figure? A. Yes, I did.

Q. What did you claim, if anything, as the correct figure for salary received by Phillip Himmelfarb during 1944?

Mr. Katz: Objected to, if the Court please, as no foundation laid, incompetent, irrelevant and immaterial, the records would be the best evidence as to what the facts are with respect to that matter. It is incompetent, irrelevant and immaterial, not bearing on any issue in this case.

The Court: Yes. I think you are going to have to produce some records along here some place, Mr. District Attorney.

Mr. Strong: Well, your Honor, he has testified to the records which he used.

The Court: I know he did.

Mr. Strong: I have produced the income tax returns. [369]

The Court: Yes.

Mr. Strong: And the only other records are the books and records of the Acme Meat Company.

The Court: Well, actually the jury has to make this determination, whether he is right or not, and they are entitled to the same information that he had.

Mr. Strong: But he only relied on those documents.

The Court: He relied on the books and records.

Mr. Strong: Of the Acme Meat Company.

The Court: That is correct.

Q. (By Mr. Strong): Do you have the books and records of the Acme Meat Company? A. No, I have not.

The Court: You did have access to them, however, in making your calculations?

The Witness: Yes, sir.

Q. (By Mr. Strong): Where did you last leave them or see them?

Mr. Katz: That has been asked and answered, and has no bearing on any issue, if the Court please.

Mr. Strong: We don't have those books and records, your Honor, but we have some computations which the witness made from them.

Mr. Katz: Neither do we, your Honor. [370]

The Court: I cannot help it. It is still hearsay. Unless you produce the books and records here from which they are made so that the parties themselves may examine them and the jury, if they desire, may look at them.

Mr. Strong: They are not available to us, your Honor. I don't want to state the reasons in Court.

The Court: There are processes of the United States Government to use and you have the processes of this court.

Mr. Strong: Does your Honor suggest that I could use that process in a criminal case as to these books without going further into the books?

The Court: I am not suggesting anything. I am just reminding you that the law is here. Here is the body of the law which you can avail yourself of. I am not saying in advance whether you can correctly or properly do so, but I am saying that you cannot produce a witness on the stand, who has gathered information from books which are not here

and which the parties do not have available to examine and which the jury can see. *Otherwise it is the rankest kind of hearsay.*"

The record had previously shown that Mr. Ormont was transacting business under the name of Acme Meat Company, and with the foregoing transpiring between Court, Prosecuting Attorney and Counsel for Mr. Himmelfarb, in the presence and within the hearing of the jury, and subsequently on the afternoon of June 3, while Court was in session and in the presence of the jury, in walks a Deputy U. S. Marshal and walks over to Mr. Ormont and in direct view of the jury, serves him with a *Duces Tecum* Subpoena to produce the books and records of Acme Meat Company. Mr. Strong had caused this subpoena to be issued without first obtaining an order from the Trial Judge but obtaining it from another Judge. See Record Volume II, pages 805 to 808. This incident certainly could not have escaped the jury, because, as Mr. Strong says on page 890, the Deputy Marshal was a lady, and the Court remarked that she was a good-looking lady too. The Court denied that the appellant had been prejudiced, because there was no showing that the jury knew exactly what was going on. Obviously there was no way for us to show such a matter, without emphasizing it. We call the Court's attention to the case of *McKnight v. U. S.*, 115 Fed. 972, as the leading case on the subject in which it was held that it was prejudicial error to permit a *demand* to be made on a defendant in a criminal case in the presence of the jury as it was a violation of the immunity secured to him by the Fifth Amendment to the Constitution, providing that no person in any criminal case should be compelled to be a witness against himself, even though no order for the production of the paper is made, and the

demand is made solely because of its supposed necessity to authorize the introduction of secondary evidence. See also *Boyd v. U. S.*, 116 U. S. 616.

We have covered a portion of the errors assigned, because we are satisfied that we have covered a few of the fatal errors. All other errors assigned and not argued are obvious on their face, without the necessity of argument or citation of authorities, and we respectfully submit that the appellant is entitled to a reversal with instructions to dismiss the indictments and discharge the defendant, Ormont, in this case, for the many reasons herein and in our opening brief set forth.

Respectfully submitted,

DALY B. ROBNETT,

BENJAMIN F. KOSDON,

By DALY B. ROBNETT,

Attorneys for Appellant, Sam Ormont.

No. 11664

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT M. DE LA LAMA,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

No. 11664

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT M. DE LA LAMA,
Appellant,
vs.
UNITED STATES OF AMERICA,
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Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

MESSRS. WILL G. BEARDSLEY and
LYNN J. GEMMILL,

2307 Northern Life Tower,
Seattle 1, Washington.

Attorneys for Appellee:

MESSRS. J. CHARLES DENNIS and
ALLAN POMEROY,

1017 U. S. Court House,
5th and Spring,
Seattle 4, Washington.

United States District Court, Western District
of Washington, Northern Division

No. 47196

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT M. DE LA LAMA,

Defendant.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about the 23rd day of March, 1946, at Seattle, in the Northern Division of the Western District of Washington, Robert M. De La Lama, knowingly, wilfully and unlawfully purchased three ounces of Opium Prepared for Smoking, which were not then in nor from the original stamped package.

All in violation of Title 26, U.S.C., Section 255a.

Count II.

That on or about the 23rd day of March, 1946, at Seattle, in the Northern Division of the Western District of Washington, Robert M. De La Lama, knowingly received and concealed three ounces of Opium Prepared for Smoking, which Opium had theretofore been imported and brought into the

United States of America contrary to law, and Robert M. De La Lama then knew said Opium had been so imported.

All in violation of Title 21, U.S.C., Section 174.

Count III.

That on or about the 23rd day of March, 1946, at Seattle, in the Northern Division of the Western District of Washington, Robert M. De La Lama, knowingly, wilfully and unlawfully purchased three (3) ounces, one hundred fifty (150) grains of Opium Prepared for Smoking, which were not then in nor from the original stamped package.

All in violation of Title 26, U.S.C., Section 2553a.

Count IV.

That on or about the 23rd day of March, 1946, at Seattle, in the Northern Division of the Western District of Washington, Robert M. De La Lama, knowingly received and concealed three (3) ounces, one hundred fifty (150) grains of Opium Prepared for Smoking, which Opium had theretofore been imported and brought into the United States of America contrary to law, and Robert M. De La Lama then knew said Opium had been so imported.

All in violation of Title 21, U.S.C., Section 174.

Count V.

That on or about the 25th day of March, 1946, at Seattle, in the Northern Division of the Western District of Washington, Robert M. De La Lama,

knowingly, wilfully and unlawfully purchased fifty-four (54) ounces, twenty-two (22) grains of Opium Prepared for Smoking, which were not then in nor from the original stamped package.

All in violation of Title 26, U.S.C., Section 2553a.

Count VI.

That on or about the 25th day of March, 1946, at Seattle, in the Northern Division of the Western District of Washington, Robert M. De La Lama, knowingly, wilfully and unlawfully received and concealed fifty-four (54) ounces, twenty-two (22) grains of Opium Prepared for Smoking, which Opium had theretofore been imported and brought into the United States of America contrary to law, and Robert M. De La Lama then knew said Opium had been so imported.

All in violation of Title 21, U.S.C., Section 174.

A true bill.

DUDLEY J. BENNETT

Foreman

J. CHARLES DENNIS

United States Attorney

ALLAN POMEROY

Assistant United States

Attorney

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court Feb. 26, 1947. Millard P. Thomas, Clerk; by Lee L. Bruff, Deputy.

District Court of the United States, Western
District of Washington, Northern Division

No. 47196

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT M. DE LA LAMA,

Defendant.

VERDICT

We, the jury in the above-entitled cause, find the defendant Robert M. De La Lama is guilty as charged in count I of the Indictment; and further find the defendant Robert M. De La Lama is guilty as charged in count II of the Indictment; and further find the defendant Robert M. De La Lama is guilty as charged in count III of the Indictment; and further find the defendant Robert M. De La Lama is guilty as charged in count IV of the Indictment; and further find the defendant Robert M. De La Lama is guilty as charged in count V of the Indictment; and further find the defendant Robert M. De La Lama is guilty as charged in count VI of the Indictment.

VALLIE D. DICKSON,

Foreman.

[Endorsed]: Filed May 21, 1947.

[Title of District Court and Cause.]

AMENDED MOTION IN ARREST OF
JUDGMENT OR FOR NEW TRIAL

Comes now the above named defendant and moves that the verdict of guilty returned against him by the jury be arrested and no judgment and sentence be imposed thereon for the following reasons:

1. That there is no evidence in the record in support of the Indictment or any of its counts.
2. There is no evidence to support the verdict.
3. The evidence affirmatively discloses the defend not guilty.

In the event that this motion be overruled then the defendant moves for a New Trial upon the grounds above set forth and upon the additional ground of errors of law occurring at the trial of the above cause and duly excepted to by the defendant.

That this motion in arrest of judgment or for a new trial is made in amendment of the original motion on file herein.

WILL G. BEARDSLEE,
Attorney for Defendant.

Received a true copy.

JOHN E. BELCHER
Assistant United States
Attorney

[Endorsed]: Filed June 6, 1947.

United States District Court, Western District
of Washington, Northern Division

No. 47196

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT M. DE LA LAMA,

Defendant.

JUDGMENT, SENTENCE, AND COMMITMENT
AND ORDER OF PROBATION

On this 6th day of June, 1947, the attorney for the Government and the defendant Robert M. De La Lama appeared in person, the defendant being represented by Will G. Beardslee and Lynn J. Gemmill, his attorneys, the Court finds the following:

That prior to entering his plea, a copy of the Indictment was given to the defendant; that the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty on Counts I, II, III, IV, V and VI of the Indictment; that by order of this Court pre-sentence investigation was made; now, therefore,

It is Adjudged that the defendant has been convicted by jury verdict of the offense of violations of Section 174, Title 21, U.S.C., as charged in Counts II, IV and VI of the Indictment, and of the offense of violation of Section 2553a, Title 26, U.S.C., as charged in Counts I, III and V of the

Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It is Adjudged that the defendant is guilty as charged in Counts I, II, III, IV, V and VI of the Indictment, and is convicted.

It is Ordered and Adjudged that on Count VI of the Indictment the defendant be committed to the custody of the Attorney General for the United States or his authorized representative for imprisonment in the United States Penitentiary, McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Three (3) Years and Seventy-Five (75) Days and pay a fine to the United States of America in the sum of One Dollar (\$1.00), to stand committed until said fine is paid; and

It Is Further Ordered and Adjudged that on each of Counts I, II, III and V of the Indictment the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in the United States Penitentiary, McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of One (1) Day and pay a fine to the United States of America in the sum of One Dollar (\$1.00), to stand committed until said fine is paid, the execution of

the confinement part of sentence imposed on Counts I, II, III and V to be concurrent with and not consecutive to the sentence imposed on Count VI of the Indictment; and

It is further Ordered and Adjudged that on Count IV of the Indictment the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in the United States Penitentiary, McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Eighteen (18) Months and pay a fine to the United States of America in the sum of One Dollar (\$1,00), to stand committed until said fine is paid, the execution of the imprisonment part of sentence imposed on Count IV to be consecutive to and not concurrent with the sentence imposed on Count VI of the Indictment.

Provided, However, that the execution of sentence as to imprisonment Only on Count IV of the Indictment be and it is hereby Suspended and said defendant placed on probation as provided by law, for a period of Five (5) Years, commencing upon the completion of execution of sentence imposed on Count VI herein, during good behavior, in accordance with the terms and conditions of the laws of the United States relating to probation, upon the condition that said defendant does not break any law of the United States or of any state or com-

munity where he may be, and that during such period he shall report regularly to the United States Probation Officer at the times and in the manner said Officer shall direct, and shall abide by all the rules and regulations of probation and upon the express condition that said defendant does not unlawfully use or handle narcotics in any form.

It Is Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence, Commitment, and Order of Probation to the United States Marshal or other qualified officer, and that a copy serve as the commitment of the defendant.

Done in Open Court this 6th day of June, 1947.

JOHN C. BOWEN,

United States District Judge.

Presented by:

JOHN E. BELCHER,

Assistant United States

Attorney.

[Endorsed]: Filed June 6, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Robert M. De La Lama, in custody of U. S. Marshal, Seattle, Washington, Appellant.

Will G. Beardslee, 2307 Northern Life Tower, Seattle 1, Washington, Attorney for Appellant.

Offense: Violation of Section 174, Title 21, U.S.C., as charged in Counts II, IV and VI of the Indictment—knowingly receiving and concealing opium prepared for smoking which had been imported into the United States contrary to law; violation of Section 2553a, Title 26, U.S.C. as charged in Counts I, III and V of the Indictment; knowingly purchasing opium prepared for smoking which was not then in nor from the original stamped packages.

Date of Sentence: June 6, 1947.

Judgment, Sentence and Order of Probation: Adjudged that Defendant is guilty on all six counts of the Indictment in accordance with the verdict of the jury. As to Count VI the defendant is committed to custody of Attorney General of United States for imprisonment in the United States Penitentiary at McNeil Island, Washington, for a period of three years and 75 days and a fine of \$1.

As to Counts I, II, III and V of the Indictment the Defendant is committed for imprisonment in the United States Penitentiary, McNeil Island,

Washington, for a period of one day and pay a fine of \$1, sentence to run concurrently with sentence imposed on Count VI.

As to Count IV of the Indictment the Defendant is committed for imprisonment in the United States Penitentiary, McNeil Island, Washington, for a period of eighteen months and pay a fine in the sum of \$1, sentence to be consecutive with sentence on Count VI and the same suspended and defendant placed on probation for a period of five years.

Defendant is now confined in the King County Jail at Seattle, Washington.

Judgment, sentence and order of probation is dated June 6, 1947.

The above named Defendant, Robert M. De La Lama, does hereby appeal from the judgment, sentence, commitment and order of probation dated June 6, 1947, adjudging Defendant to be guilty on all six counts of the Indictment and the sentences imposed as contained therein, and from each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 13th day of June, 1947.

ROBERT M. DE LA LAMA,
By WILL G. BEARDSLEE,
His Attorney.

Received a copy of the within Notice this 13th day of June, 1947.

J. CHARLES DENNIS, (GM)
Attorney for Plaintiff.

[Endorsed]: Filed June 13, 1947.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now the above named defendant by his attorney, Will G. Beardslee, and herewith furnishes a statement of points to be relied upon on appeal:

1. That the Court erred in admitting, over objection of the defendant, testimony of Hugh Olivey, a Government witness, to the effect that the witness and a Mr. Van Treel purchased opium from the defendant on the night of June 29, 1946, at Phoenix, Arizona, approximately three months subsequent to the date of the offenses with which the defendant was charged and being tried upon; said subsequent alleged offense being not charged against the defendant in the indictment; that said testimony and evidence was highly prejudicial to the defendant and not legally admissible.

2. That the Court erred in failing to dismiss the action and instruct a verdict of "not guilty" at the close of the Government's case upon motion made by the defendant.

3. That the Court erred in refusing to grant defendant's motion in Arrest of Judgment and in the alternative for a new trial.

4. That the evidence was insufficient to support the verdict of guilt.

5. That the evidence of the Government witness, Lucien Vasques, affirmatively demonstrated the innocence of the defendant as to all counts of the indictment.

6. That the presumptions of unlawful purchase as alleged in Counts I, III and V of the Indictment and the presumptions of unlawful importation into the United States of opium prepared for smoking as alleged in Counts II, IV and VI of the Indictment were wholly overcome and successfully rebutted by the affirmative testimony in the case.

WILL G. BEARDSLEE,
Attorney for Defendant.

Copy received 7/3/47.

ALLAN POMEROY,
Assistant U. S. Attorney.

[Endorsed]: Filed July 3, 1947.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It is stipulated and agreed by and between J. Charles Dennis, United States Attorney, representing the plaintiff in the above cause, and Will G. Beardslee, attorney for the above named defendant, that the following designated parts of the record, proceedings and evidence in the above cause is sufficient for the purpose of considering all points to be raised by the defendant on appeal to the Circuit Court of Appeals as appears from the statement of points on appeal served and filed by the defendant and that the Clerk of the above Court

may transmit to the Appellate Court true copies of the matters designated by respective counsel herein, to wit:

1. The Indictment.
2. Verdict.
3. Amended motion in Arrest of Judgment or in the alternative for a new trial.
4. Judgment, sentence and commitment and Order of probation.
5. Notice of Appeal.
6. All of the testimony of all of the witnesses for the Government and the defendant.

J. CHARLES DENNIS,
United States Attorney.

By /s/ ALLAN POMEROY,
Assistant United States
Attorney.

/s/ WILL G. BEARDSLEE,
Attorney for Defendant.

[Endorsed]: Filed July 3, 1947.

[Title of District Court and Cause.]

MOTION

Comes now the defendant by his attorney, Will G. Beardslee, and moves the Court for an order extending the time for filing and docketing of the record on appeal in the above cause.

This motion is based upon the affidavit of Will G. Beardslee hereto attached.

WILL G. BEARDSLEE,
Attorney for Defendant.

State of Washington,
County of King—ss.

Will G. Beardslee, being first duly sworn, states: That he is the attorney of record for the defendant above named; that Notice of Appeal was filed on June 13, 1947; that although a part of the testimony has been transcribed and filed, the same is not complete; that the Court reporter, who reported the case, is on vacation and it appears for that reason that the transcript cannot be completed so that the entire record on appeal can be filed by July 23, 1947, which would be forty days from the filing of the Notice of Appeal; that affiant believes that time for filing said record on appeal should be extended thirty days beyond the time allowed by the Rules of Criminal Procedure, that is, to August 23, 1947.

WILL G. BEARDSLEE.

Subscribed and Sworn to before me this 9th day of July, 1947.

[Seal] MILDRED S. BEARDSLEE,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed July 12, 1947.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

This matter coming on for hearing before the court on the application of the defendant, Robert M. De La Lama, for an extension of time in which to file the record on appeal with the Clerk of the Circuit Court of Appeals for the Ninth Circuit and it appearing to the Court that said extension should be granted,

It Is Ordered, that the defendant is hereby granted an extension of time to and including the 23rd day of August, 1947, in which to file the record on appeal with the Clerk of the Circuit Court of Appeals for the Ninth Circuit on the appeal from the judgment and sentence in the above cause.

Done in Open Court this 12th day of July, 1947.

/s/ JOHN C. BOWEN,
Judge.

Approved:

J. CHARLES DENNIS,
United States Attorney.

By JOHN E. BELCHER,
Assistant United States
Attorney.

Presented by:

LYNN J. GEMMILL,
Attorney for Defendant.

[Endorsed]: Filed July 12, 1947.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America

Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 15, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as it required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the Reporter's Transcript of Proceedings, the original of which is sent up as a part of this record, constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington dated June 6, 1947.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparing the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

10 pages at 40c.....	\$4.00
4 pages at 10c (copies furnished).....	.40
Notice of Appeal.....	5.00
Total	<hr/> \$9.40

I hereby certify that the above amount has been paid to me by counsel for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 31st day of July, 1947.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 47196

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ROBERT M. DE LA LAMA,
Defendant.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington, Tuesday, May 20, 1947
9:30 A.M.

Before: Honorable John C. Bowen,
District Judge.

Appearances:

Mr. Allan Pomeroy, Assistant United States
Attorney, appearing for Plaintiff.

Mr. Will G. Beardslee, appearing for Defendant.

Whereupon, evidence was given and proceedings were had as follows, to-wit:

(A jury was duly impaneled and sworn to try the cause, after which the jury was admonished by the Court and excused until 1:45 o'clock p.m.)

The Court: Was there something, Mr. Beardslee, you wish to speak of now?

Mr. Beardslee: Yes. At this time I would like to present a petition for the issuance of a writ of habeas corpus ad testacandum, and also an order for the issuance of the writ. The petition I verified as of last Saturday, I believe.

(Discussion between Court and counsel.)

Mr. Pomeroy: I haven't seen this form. It hasn't been presented to us. I don't know that that is necessary, however.

The Court: I interpret it as an *ex parte* proceeding.

Mr. Beardslee: Yes, your Honor.

Mr. Pomeroy: The original file in this case will show that a writ has already been signed by the Court for the production of Lucian A. Vasquez at this trial, and that the Court is now informed in open court that Lucian Vasquez is now in attendance at this court house. Therefore, this writ is unnecessary and has no bearing upon his being present, because he will be called and has been ordered here already by competent authority.

(Further discussion.)

(Lucian A. Vasquez was brought before the Court.)

The Court: Is the witness Vasquez now in the presence of the Court?

Mr. Pomeroy: Yes, your Honor.

The Court: It is the order of the Court that the Marshal keep this witness in attendance during all sessions of the court in the case of United States of America, plaintiff, against Robert M. De La Lama, defendant, unless and until the Court otherwise orders in respect to him.

Mr. Pomeroy: May I have that order read?

(Order read by the reporter.)

The Court: Doesn't that cover the situation without anything further from your petition?

Mr. Beardsley: Yes, your Honor, except this: I would like to have the witness sworn in and ask him a couple of questions as to whether he desires to confer with me. The officers have indicated they would like to be present when the questions were asked.

The Court: Do you think that is necessary? Don't you think you could tend to that out of the presence of the Court, Mr. Beardslee?

Mr. Beardslee: Yes, that probably could be done.

The Court: And then if later you find you can't, I will consider any further application you wish to make.

The Court has given Mr. Beardslee the permission, and does now give him permission, to interview this witness.

Mr. Pomeroy: You are not ordering the witness to speak though, are you?

The Court: I am not ordering the witness to do anything. I am giving Mr. Beardslee the privilege of conferring with this witness while he is in the Marshal's custody at any time convenient to the Marshal. And anyone interested in the government's side of the case can be present if they wish.

You are excused until 2 o'clock. All those connected with the case are excused until 2 o'clock this afternoon.

(Whereupon, at 12 o'clock noon an adjournment was taken until 2 o'clock p.m., at which time, all parties being present as before, the proceedings were resumed as follows:)

Afternoon Session

The Court: May the record show a call of the jury waived, and that all the jurors are present and also all parties and their counsel?

Mr. Beardslee: Yes, your Honor.

Mr. Pomeroy: Yes, your Honor.

The Court: Let the record show that.

At this time we will hear the Government's opening statement of what it thinks the proof will be in this case. * * *

Mr. Pomeroy: * * * Lucian Vasquez then told the story, and Robert De La Lama also told the story, that this opium was all owned by Lucian Vasquez, so this very same wording that you read in this indictment was a charge which was made

against Lucian Vasquez. And Vasquez stated at that time that Robert De La Lama, the defendant here before the Court, had nothing whatever to do with this; that he had come along merely for the ride. He had been in the service and he was coming up to visit a brother in Tacoma. And that Vasquez, when he was bringing these narcotics from Arizona up into our country up in here, had merely brought De La Lama along for a ride up to see his brother in Tacoma, and that De La Lama knew nothing about the fact that there were narcotics in the automobile or that Vasquez had any with him.

At that time De La Lama was released and Lucian Vasquez came into court upon this charge being made and posted bond, and then Lucian Vasquez and De La Lama both then went back to Phoenix, Arizona, while Vasquez was out on bond.

* * * * *

At that time and in this same conversation the defendant De La Lama defended Vasquez to these two officers and stated that Vasquez was a mighty fine fellow and that he was his friend. In fact, Vasquez was going back up and plead guilty to this charge that had been placed against him in Seattle and was going to take the rap for De La Lama. That actually these narcotics that were in Vasquez' automobile belonged to De La Lama, and that he went along to protect his investment and also the money that he was to receive, and that Vasquez was going to take the rap for him and he was going to take care of Vasquez for doing that. * * * And at the present time he (Vasquez) will testify that

those are the facts, that he actually did come up here and his job was to bring those narcotics up here for De La Lama, and that De La Lama did come along to protect his investment.

* * * So this case revolves around the fact that the narcotics which were found in the automobile when De La Lama was in it, although the car did not belong to him, were actually De La Lama's narcotics. And when all the evidence is in I am sure that beyond a reasonable doubt you will find that this defendant is guilty of all six of these counts.

The Court: I will hear the defendant's opening statement at this time or later as he may elect.

Mr. Beardsley: I prefer reserving it, if your Honor please.

The Court: The plaintiff may call its first witness.

Mr. Pomeroy: Lucian Vasquez.

LUCIAN A. VASQUEZ

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Lucian A. Vasquez.

Q. And you were previously sentenced by this court, is that correct? A. Yes.

(Testimony of Lucian A. Vasquez.)

Q. And you are now serving a sentence of three and a half years in McNeil Island penitentiary?

A. Yes.

Q. And you were charged with the possession of opium prepared for smoking? A. Yes.

Q. Now, Mr. De La Lama, you had an automobile with you at the time of your arrest, is that correct—Mr. Vasquez?

A. Mr. Pomeroy, before I answer your question I'd like to address the Court, please.

Mr. Beardslee: I didn't hear that.

The Court: He would like to address the Court, please. You may do that.

The Witness: I would like to know the difference between when one is under oath and when he isn't.

The Court: Will counsel for the government instruct or advise the witness on that question?

Mr. Pomeroy: You are under oath when you have taken the oath in a court of record such as this, and when you were just given the oath by the clerk of the court. You are now under oath.

The Court: And when you promised under a sworn penalty to tell the truth and nothing but the truth, so help you God.

The Witness: Well, I have something to tell the Court. I wish that I would be granted permission to tell everything.

The Court: I think you had better proceed to answer the questions.

(Testimony of Lucian A. Vasquez.)

Q. (By Mr. Pomeroy): Was it pertaining to this cause that you wanted to tell——

A. Yes, I'd like to state the truth to the case.

The Court: The reason you are called to testify is to ask you questions concerning this case. Proceed.

Q. (By Mr. Pomeroy): At the time of your arrest, Mr. Vasquez, how many jars of opium did you have in your possession?

A. Well, I don't wish to answer.

Q. Well, did you have it on your person, that is what I mean? How many jars, if any, did you have on your person at the time of your arrest?

A. I do not wish to answer.

Mr. Beardslee: That presupposes, if your Honor please, that he had any in his possession.

Q. (By Mr. Pomeroy): Did you have any opium on your person when you were first arrested in March of 1946?

A. I do not wish to answer.

Mr. Pomeroy: May the jury be excused, if the Court please?

The Court: The jury will temporarily retire.

(Jury retires from court room.)

Mr. Pomeroy: If the Court please, the witness has asked if he might ask some questions of the Court. I do not unnecessarily wish to pillory the witness. Yesterday I discussed this case with him and he answered, as he told me, truthfully, the questions placed to him. It may be that there may be something in his mind now concerning this that he wishes to ask the Court which perhaps was not proper to

(Testimony of Lucian A. Vasquez.)

be done in front of the jury, and I would ask the Court to ask whatever he may have on his mind at this time.

The Court: The Court is not counsel for the witness, and if he wishes to accept the advice of either counsel present he may do that. I have to pass upon the questions and answers that may be made or objections that may be made to it, and there is nothing before the Court yet. You may proceed. I don't see any use of anything being before the Court.

Mr. Pomeroy: May I ask him what is the question he desires to ask?

The Court: You may.

Q. (By Mr. Pomeroy): What is the question?

A. I want to tell the Court the 'underhanded methods that the agents are using in order to convict a man, and I know everything about the case and I am put up here under oath and I would like to tell everything I know about the case and if I can't, I would like to have Mr. Beardslee use me as his witness.

Mr. Pomeroy: Well, in that event——

Mr. Beardslee: This request comes as a surprise to me, your Honor, because the witness would not discuss the matter with me. But I will say at this time that I certainly would love to be appointed by the Court to represent the witness so that we might have the matter aired that the witness now desires to testify to. I can readily understand now why he would like to know if he is under oath.

(Testimony of Lucian A. Vasquez.)

The Court: I don't see how any man with ordinary common sense would not know. He just took the oath.

(Further discussion by Mr. Beardslee.)

The Court: Anything you wish to ask him?

Mr. Pomeroy: Nothing further. I might say that I am going to ask questions and if they are not answered as I understand the answers to be, I am completely surprised and will ask permission to cross-examine this witness.

The Court: Anything else before bringing in the jury?

Mr. Beardslee: No, except I will suggest this to your Honor now: I will object to any effort made to cross-examine the witness from here on out. Counsel has now been notified in the absence of the jury as to what the witness intends to testify to. He cannot from here on claim surprise. If that came as a surprise before the jury that would be entirely different. But——

The Court: Does either of you have any authorities on that question?

Mr. Beardslee: I don't have any authorities with me, your Honor, but I had occasion to brief the question some time ago. That was an instance where—well, it pertained to an alleged robbery in town here. A witness had stated to Mr. McKinney, then assistant United States attorney, that he was hired to perform this robbery pertaining to government property. That prior to the trial the witness changed his mind and he gave a statement in front of a dep-

(Testimony of Lucian A. Vasquez.)

uty sheriff and a court reporter, under my questioning, which was entirely different than what he had told the assistant United States attorney. I presented that statement to the assistant on the morning of trial. I had briefed the question, and I believe I still have the old brief in my office. This has been quite some few years ago. If I do, I believe I can demonstrate this in short order.

But the only time you can impeach your own witness is when you can only claim surprise; when there is no longer any surprise as to what the witness will testify to, then he can't resort to cross-examination or impeachment of his own witness.

Mr. Pomeroy: Well, if the Court please, we have briefed it a number of times. I don't know that he is not going to answer the same as yesterday, but if he doesn't, then I will plead surprise because it will be of great surprise to me if he changes his story since yesterday afternoon.

He has not answered yet. The only thing I have heard so far in the testimony outside of the province of the jury is the fact he desires to say something concerning the conduct of certain officers. I am not going to ask him about that. That isn't what I am going to inquire about. I am going to inquire into the actual transaction. And if it isn't answered, which I suspect now is what will happen—I suspicion, I don't know—then I will be surprised.

The Court: Bring in the jury.

(Jury returns to jury box.)

(Testimony of Lucian A. Vasquez.)

The Court: Let the record show all the jurors have returned to their places as before. You may proceed.

Q. (By Mr. Pomeroy): Mr. Vasquez, the narcotics which you pleaded guilty to having in your possession when you were sentenced in this court having been found on you in Seattle, where did you get those? In what state?

Mr. Beardslee: If your Honor please, I object to that as decidedly immaterial in this case.

The Court: Overruled.

Mr. Beardslee: What he had in that case is over. He has pleaded guilty and been sentenced. It has nothing to do with this case.

The Court: What is the purpose of it?

Mr. Pomeroy: The purpose is to show that Mr. De La Lama was with Mr. Vasquez all the time he had these narcotics in the car and coming from Arizona.

The Court: The objection is sustained.

Mr. Pomeroy: Well, if the Court please, I am bringing out here that this man was in an automobile with certain narcotics and the defendant here was in the car with him.

The Court: Well, you will have to ask him where he was such and such a time, who was there, what was there, and so on.

Mr. Pomeroy: The question was, "Where did you bring the narcotics from, what state to Seattle?" That was the only question I had asked him.

(Testimony of Lucian A. Vasquez.)

Mr. Beardslee: This witness hasn't admitted so far that he brought any narcotics into the state.

The Court: The objection is sustained to the question in the form it is now put.

Q. (By Mr. Pomeroy): Mr. Vasquez, you did have about 15 jars of opium on you when you were arrested in Seattle, is that correct? A. Yes.

Q. And where did you bring those narcotics to Seattle from? A. Phoenix, Arizona.

Q. And what car did you bring them up in?

A. My own.

Q. And what kind of a car was it?

A. It was a 1940 convertible Oldsmobile.

Q. Did you travel alone or with someone when you came from Phoenix to Seattle?

A. I traveled with the defendant.

Q. You traveled with Mr. De La Lama?

A. Yes.

Q. And was he with you in Seattle when you were arrested? A. Yes.

Q. And in these 15 jars what kind of opium was it? A. Smoking opium.

Q. And besides these 15 jars did you have another type of opium with you?

A. I had a little bottle of liquid.

Q. A bottle of opium in liquid form, is that correct? A. Yes.

Q. And actually whose narcotics were those, yours or the defendant, Mr. De La Lama's?

A. They belonged to me.

(Testimony of Lucian A. Vasquez.)

Mr. Pomeroy: Well now I will plead surprise, if the Court please, and ask to cross-examine this witness.

Mr. Beardslee: I object to counsel's cross examination.

The Court: What is the basis of the surprise?

Mr. Pomeroy: Because I wish to state that yesterday he told me the narcotics belonged to Mr. De La Lama.

The Court: The objection is overruled. You may inquire.

Q. (By Mr. Pomeroy): Mr. Vasquez, did you have a conversation with me yesterday afternoon?

A. I did.

Q. And where did that conversation take place?

A. In your office.

Q. And who was present at that conversation?

A. Lieutenant Belland, and some other narcotic agent and yourself.

Q. Was it—stand up—Mr. Giordano?

A. Yes.

Q. And will you stand up—was it Mr. Belland?

A. Yes.

Q. And it was in my office, is that correct?

A. Yes.

Q. And did I ask you these same questions yesterday afternoon, approximately the same questions? A. Yes.

Q. What did you tell me yesterday afternoon as to the ownership of that opium?

A. Well, do you want me to tell the Court why I made the statement?

(Testimony of Lucian A. Vasquez.)

Q. Tell me what you told me yesterday afternoon concerning the ownership of that opium.

A. I told you they belonged to Robert De La Lama.

Q. And didn't I ask you yesterday afternoon why it was that you were telling me yesterday that it belonged to Robert De La Lama, when you were arrested, that you said it was yours?

A. Yes.

Q. And what did you say to me?

A. What did I say to you?

Q. Yes, what was your answer when I asked you why it was that your story now was the narcotics belonged to De La Lama when at the time of your arrest you stated it was yours, and what was your answer to that question?

Mr. Beardslee: Objected to as argument, and it isn't a direct question.

The Court: Overruled.

Mr. Beardslee: It is argument. Well——

A. Well, Mr. Pomeroy, I can't answer that because those questions were put direct to me the way you wanted them. That is why I answered them that way. Not because I had the intention of answering them that way in court.

Q. In other words, you were talking to me yesterday, then, on the grounds that you were just answering questions and you weren't in court. Is that your statement now? A. Yes.

Q. What was your statement yesterday as to why you told me that the narcotics belonged to De

(Testimony of Lucian A. Vasquez.)

La Lama when I asked you why you changed your story? What did you give me as your reason?

A. Well, I was made different kinds of promises in order to say that.

Q. What did you tell me? That is my question. What did you tell me as to your reason?

A. I told you whatever you wanted me to say in order to satisfy you, I did.

Q. Did I ask you to make the statements that you made?

A. Well, you read out a statement to me pertaining to the same case from Earnest Collins stating that he heard Robert De La Lama——

Mr. Beardslee: Your Honor, I am going to have to object to any hearsay being injected into this case.

The Court: That will be sustained.

Q. (By Mr. Pomeroy): Did you or did you not tell me that De La Lama had promised to take care of you after you pleaded guilty and that you hadn't been taken care of and that you wanted now to tell the truth?

A. Yes, I did.

Q. Did you tell me that yesterday?

A. I did, because you wanted me to.

Q. Did I ask you to tell me that?

A. Well, more or less.

Mr. Beardslee: I submit it has been answered.

The Court: The objection is overruled.

Q. (By Mr. Pomeroy): As a matter of fact, didn't I tell you that I wanted you to tell the truth?

A. Yes.

(Testimony of Lucian A. Vasquez.)

Q. And you told me that you were telling the truth now and you wanted to take the stand and tell the truth? A. Not in there I didn't.

Q. Didn't you tell me that you wanted to take the stand and tell the truth?

A. Yes, that is right. That is why I took the stand, to tell the truth.

Q. And you told me yesterday that you were telling me the truth, didn't you?

A. But I wasn't.

Q. In other words, you weren't telling me the truth yesterday? A. No.

Q. But you did state to me yesterday that Mr. De La Lama had gone up to Mr. Beardslee's office and made arrangements for you so you could come up and plead guilty, is that correct?

A. Well, I merely went by what the statement that you read to me and——

Q. (Interrupting): No, but didn't you tell me that? A. Yes, I did.

Q. And didn't you tell me that you had been told that you would get—that you then went up to see Mr. Beardslee and that you had made arrangements to pay a certain amount of the fee and that you would get either a sentence to a narcotics health farm or a year and a day in the pen? Didn't you tell me that?

A. Well, I did, but Mr. Beardslee can verify them statements.

Q. Didn't you tell me that yesterday?

A. Yes.

(Testimony of Lucian A. Vasquez.)

Q. And that then when you came into court and got three and a half years in the penitentiary that you had been let down? Isn't that what you told me yesterday? A. Yes.

Q. Are you now stating that what you told me yesterday in all those statements was not true?

A. Yes.

Q. All right. Now you tell what the truth is then? A. Well, last Thursday——

Q. (Interrupting): Tell what the truth is concerning your pleading guilty and being sentenced.

Mr. Beardslee: That question is very general and counsel has opened a wide field of cross-examination for me.

Mr. Pomeroy: Well, I don't care.

Mr. Beardslee: I think the Court will insist the witness be permitted to answer your question.

The Court: Let him answer your question. Try to be as direct in your answer as possible.

Mr. Pomeroy: You may answer anything you want, Mr. Vasquez. Just tell your story now.

A. Well, last Thursday I had a visit at McNeil Island from Mr. Belland and some other federal officers.

The Court: You don't speak the name very distinctly. What was the name of the man who visited you last Thursday? A. Mr. Belland.

The Court: Belland?

A. Bellen, and some other officer, federal officer.

The Court: Do you know the other man's name?

(Testimony of Lucian A. Vasquez.)

A. No, I don't. They were down there and asked me if I wanted to come down here and testify against the defendant because they also told me that they had enough evidence in order to get a conviction and all that, and they needed my help. And in the meantime I asked them what was in it for me, and they told me that I could be recommended for parole and make parole, which at the time I knew that any recommendations from Mr. Pomeroy or any of them would not have any affect on me when I went up for parole, because the Parole Board does not give out paroles to anybody that has been convicted of a narcotics charge.

So I told them I would come down here. I wanted to get a little more information on it. Yesterday afternoon I was brought over from the institution direct to Mr. Pomeroy's office, which I was in there again. Again I was made promises about parole and all that, which I knew that they wouldn't go through with their part of it and I didn't see any sense with going through with my part of it, either. They was playing a game with me and so was I with them, I knowing all the time that the stuff belonged to me; I pleaded guilty and Bob was innocent, didn't know anything about it at the time. It was my responsibility to get him out as easy as I could at the time we was both arrested.

During that time when we was arrested Mr. Beland, the narcotics officer, they had us in there questioning us most of the time, and I told them I made statements to that effect, which eliminated Bob of all charges.

(Testimony of Lucian A. Vasquez.)

And they only had two jars of smoking opium at the time. They didn't know where the rest of the stuff was. So I made a proposition with them. I told them if they released Bob of all charge which he was innocent, I would turn over the rest of the stuff, which I told them I had hid out in the hills.

One of the agents came over and shook hands with me and told me his word was his bond, and all that, and I told him, "If you turn Bob loose I will turn the rest of the stuff over," which the rest of the stuff was in the automobile at the time only they couldn't find it.

From then on, well Mr. Beardslee knows, he handled the case for me, he knows all about the rest. Mr. Beardslee knows that I paid him off myself at the time that I hired him for my attorney. There was nothing whatever in my statements about Bob paying off or anything like that.

I felt it was my responsibility to get him off because I had gotten him into it. I took the blame for it, it was mine, and I told the Court I was persecuted most of the time all during the time I was out on bond and made promises and all that, even Joe Belland, when I was in court here, used false statements on me in order to get me as much time as possible because I wouldn't cooperate with him.

I knew all the time that any recommendations they could give or anything like that would not do me any good, so the only thing I could do was to come back at them with the same thing.

(Testimony of Lucian A. Vasquez.)

Q. (By Mr. Pomeroy): Did I make you any promises yesterday about parole?

Mr. Beardslee: Mr. Pomeroy is not on trial, if your Honor please.

The Court: Overruled.

Mr. Beardslee: The witness has said the other people made the promises.

The Court: He made the statements, which in my opinion made this question a proper—

Mr. Beardslee: Yes, your Honor.

Mr. Pomeroy: Read the question.

(Question read by the reporter.)

A. No. You was out of the room.

Q. I made no promises whatever, isn't that correct? A. That is right.

Q. I asked you to tell the truth, isn't that correct? A. Yes.

Q. When you were out on bond with Mr. De La Lama, I mean after you were released up here, where did you go? A. Phoenix, Arizona.

Q. With whom did you go to Phoenix?

A. By myself.

Q. By yourself. Did you see Robert De La Lama in Phoenix? A. Yes.

Q. When you left Phoenix how did you travel from Phoenix to Seattle to come back here to be sentenced? A. By plane.

Q. Did you have any narcotics in your possession when you came back from Phoenix?

A. Yes.

(Testimony of Lucian A. Vasquez.)

Q. Who gave you those narcotics?

A. I bought them myself.

Q. From whom?

Mr. Beardslee: Objected to as immaterial. That isn't the case that is on trial here at all.

Mr. Pomeroy: Mr. De La Lama——

The Court: Overruled.

Q. Did Mr. De La Lama give you those narcotics? A. No, he didn't.

Q. Did you buy them from him?

A. No. I was addicted to narcotics and I bought them off a Chinaman in Chinatown in Phoenix, Arizona.

Q. Is Mr. De La Lama addicted to narcotics, also? A. No, not to my knowledge.

Q. You don't know that he has ever used any?

A. No, I don't.

Mr. Pomeroy: You may cross-examine.

Cross-Examination

By Mr. Beardslee:

Q. It was indicated to you, was it not, Mr. Vasquez, prior to entering your plea of guilty that there was a good chance of your becoming hospitalized?

A. Yes.

Q. And that was urged and presented to the Court at the time of your sentence, wasn't it?

A. Yes.

Q. That you be hospitalized in order to effect a cure from your unfortunate addiction?

A. Yes.

(Testimony of Lucian A. Vasquez.)

Q. And the Court made a comment at that time, didn't he, that it was because of the quantity of opium that your sentence in this matter would be quite severe? A. Yes.

Q. Mr. Belland, you say he misled the Court, he made some statements in court that were not true. Do you mind telling us what those statements were, or would you prefer not?

A. I believe he had reference to me having several prior convictions in assault with a deadly weapon, which I have never been convicted on that before. It was just a matter when I was a juvenile, 15 or 16 years of age at the time.

Q. You were, after being arrested, a pretty sick boy, were you not? A. Yes, I were.

Q. And that illness was caused by reason of the fact that you, while in jail, could not obtain narcotics to keep you going, is that right?

A. That is right.

Q. And isn't it also true that you were even refused a tapering-off cure? A. Yes.

Q. And didn't you on various occasions appeal to me to see some doctor, a physician or surgeon of my own or anyone that would administer it to you because of your condition? A. Yes.

Q. And did I not have you in open court and ask the Court for permission to have either a government or a county physician prescribe narcotics for you, enough to alleviate your suffering at that time?

A. Yes.

Q. In spite of the pain and suffering that you

(Testimony of Lucian A. Vasquez.)

were going through while in jail, you still assumed the responsibility of owning that opium, isn't that true? A. Yes.

Q. You would have given up just about anything you ever owned, would you not, to have gotten out of jail where you could obtain narcotics on your own if that opportunity had been presented?

A. Just about anything.

Q. Were you not at that time strongly tempted to say that it was De La Lama's opium?

A. Very near.

Q. And were you not advised by federal narcotics agents that you were going to stay there and suffer until you told them the truth of everything?

A. Yes.

Q. They would see to it that you would not obtain any relief or medical treatment?

A. Yes.

Q. Did a doctor ever come to see you all the time you were in jail here? A. No.

Q. And did you frequently request that a doctor see you? A. I did.

Q. Were you ever present when I made a request to the jailer that the doctor be called to see you and prescribe for you? A. I was.

Q. Do you remember how long you were in jail before you were able to obtain bail?

A. Four or five days.

Q. And do you remember how long they held De La Lama before they let him go?

(Testimony of Lucian A. Vasquez.)

A. We was arrested on a Saturday afternoon. I think they released him on a Monday night. I am not quite sure.

Q. Counsel, in his opening statement, told the jury that the officers had not searched the car at the time you told them where the main bulk of the opium was. Is that true or untrue?

A. I think they went over the car pretty thoroughly.

Q. Well, isn't it a fact they told you they had gone over the car? That is about the time you told them you had it cached up in the hills some place?

A. Yes.

Q. Incidentally, was that car of your confiscated by the government? A. It was.

Q. Did De La Lama or any member of the police department or federal narcotics squad know where that opium was until you voluntarily disclosed it?

A. No, I don't believe anybody did.

Q. I am particularly interested in whether De La Lama knew.

A. No, he couldn't have known.

Q. This, as I understand, was in some secret compartment of your car?

A. Well, it wasn't really a secret compartment. It was a tool chest that the Oldsmobile people made in the trunk of the automobile. I just happened to run into it.

Q. I see. Did you ever have occasion, or did you ever open that compartment at any time in the presence of De La Lama? A. Never.

(Testimony of Lucian A. Vasquez.)

Q. Would De La Lama have an opportunity of knowing where it was any more than the agents for the narcotics squad or the police department would have prior to the time you disclosed its whereabouts? A. He would not.

Q. To your knowledge De La Lama—or as far as you know, let's put it that way, De La Lama has never used narcotics in any form or fashion?

A. Not to my knowledge.

Q. He did not even know that you were an addict until after you were in jail, did he, here in Seattle?

A. Yes, I kept it from him until the day of my arrest.

Q. And then you told him?

A. Well, I couldn't help it then because I was addicted to it and I tried to get that little bottle of medicine which I was using at the time.

Q. Counsel asked you a question about you and De La Lama being in my office and that De La Lama agreed to take care of you and pay my fee. Has De La Lama ever in his life been in my office that you know of? A. Not that I know of.

Q. Counsel also implied to the jury—didn't say so—that you and De La Lama then went back, I believe it was, to Phoenix after your release. Was De La Lama ever here in Seattle at the time you were released on bail?

A. No, he was in Phoenix, Arizona.

(Testimony of Lucian A. Vasquez.)

Q. Has he ever traveled with you at any time other than the occasion when he came with you in your car from Phoenix to Seattle?

A. Not that I remember of.

Q. Incidentally, did you have a personal knowledge of the fact that he did want to come over and see his brother?

A. Yes, I did. That is why I brought him over.

Q. And De La Lama, the defendant here, had been released from the Army shortly prior to the time that——

A. (Interrupting): Yes. He was just released and he was short on money. He had a little money but that was all, that he had saved during his stay in the Army. I volunteered to bring him here since I was making the trip.

Q. Do you know how long he had been in the service?

A. Oh, I don't know. Maybe 22 or 23 months. I am not quite sure.

Q. It was over two years, as a matter of fact, as far as you know?

A. Oh, yes.

Q. And he had been wounded, had he not?

A. Yes.

Q. That and the shortness of funds, wasn't that one of the reasons why you wanted to help him out by bringing him over here?

A. Yes.

Q. Now just how did they make these offers that if you would come up and testify in this case they would try to assist you in obtaining a parole? What did they say they would do for you?

(Testimony of Lucian A. Vasquez.)

A. Well, recommendations, and every little thing like that, and which I know, I found out that anything anybody can say after the case is out of their jurisdiction will not have any effect upon the Parole Board in Washington.

Q. How long have you been in the pen on McNeil Island now on this charge?

A. Ten months.

Q. You know for sure that your testimony that you are giving now is going to antagonize the officers who might make recommendations for you?

Mr. Pomeroy: I object to that as calling for a conclusion.

Mr. Beardslee: I think it shows the interest of the boy.

Mr. Pomeroy: "Are you sure the officers are going to be antagonized?" That is calling for a conclusion.

Mr. Beardslee: I will bet on that.

The Court: Overruled.

Q. (By Mr. Beardslee): You realize, don't you, that by reason of the testimony you are giving here that you may have to serve out practically all the rest of the three and a half years? In spite of that you still want to tell the truth and claim responsibility, do you?

A. Yes. I don't like to see an innocent man going to prison.

Q. This health farm, you were fully advised about that government institution where narcotic addicts are sometimes sent there for a cure, it might take a year or year and a half? I mean, what you

(Testimony of Lucian A. Vasquez.)

were anticipating or hoping for at the time you came up for sentence, that had all been explained to you, hadn't it? A. Yes.

Q. Are you over the habit now, Mr. Vasquez?

A. Yes.

Q. I presume—I don't know, I presume—you had some tapering off process at the Island, McNeil Island? A. No; none whatever.

Q. How long has it been since you have not used narcotics of any nature?

A. Well, I can't say; just the amount of time I have been in prison, I suppose.

Q. Well, practically since your arrest, is it not?

A. Yes.

Q. Your mind is now clear? A. Yes.

Q. Is your body healthy aside from some cancerous condition?

A. Well, I have always been troubled with this cancer operation that I have had. That is how I was addicted to narcotics.

Q. In the first instance? A. Yes.

Q. But aside from that you are healthy now in body and mind, are you?

A. Yes, I feel very good.

Q. This operation for cancer was on your throat?

A. Yes, my thyroid gland.

Q. And you had to be sent back East to some specialist? A. Yes.

Q. That was how long ago?

A. I am not quite sure. It is about three years ago.

(Testimony of Lincoln A. Vasquez.)

Q. And ever since that day until the time you were arrested on this case you were aware of less contact is that correct? A. I was.

Q. When I say "withheld," for the purpose of the record I mean to say that. Did De La Lanza ever at any time tell you that he would take care of you in any way?

A. No, I don't see how he could.

Q. Wasn't it just about the opposite? Wouldn't you be concerned of his was somehow sort of helping him out when he first returned from service?

A. Yes.

Q. You know that I tried to see you yesterday to talk to you to ascertain what your testimony might be, didn't you? A. Yes.

Q. And you refused to talk to me, did you not?

A. Yes.

Q. Did I, in the presence of a Deputy U. S. Marshal again try to talk to you shortly after 12 o'clock, about 12:05 o'clock? A. Yes, did.

Q. And did you not refuse to talk to me then?

A. I did.

Q. Have you ever discussed this case with me?

A. No.

Q. Haven't you, as a matter of fact, steadfastly refused to discuss it with me or anyone else that might be connected with the defendant?

A. That is right.

Q. Did somebody ask you not to talk to me about this?

A. No, nobody did, but I thought it is best not to.

(Testimony of Laurence A. Vesques.)

Q. Did anyone intimidate you in any way or suggest that you should not talk to me?

A. Well, when I was taken to the county jail yesterday the officers took me over, said you was asking to see me. It was up to me whether I wanted to see you or not, and if I didn't, why they could tell the jailer I was allowed no visitors, which I figured that is what they wanted me to do, so I cooperated with them and told them I wouldn't see you, which I wanted in that way, too.

Q. Did anyone in your presence tell the jailer that I was not to be permitted to see you?

A. What is that again, please?

Q. Did anyone in your presence tell the jailer that I was not to be permitted to see you?

A. No.

Mr. Beardslee: Redirect examination.

Redirect Examination

By Mr. Pomeroy:

Q. What were you going to do with all this opium you brought up to Seattle?

Mr. Beardslee: Object to that, if your Honor please, as decidedly immaterial in this case. He denied that De La Lama had anything to do with it. He is asking what he intended to do with it. This man has been sentenced right here in this court.

The Court: What is the theory of admissibility?

Mr. Pomeroy: What he was going to do with this narcotic. He had De La Lama in that car with him, where they were going to go with it and what they were going to do with it.

(Testimony of Lucian A. Vasquez.)

Mr. Beardslee: That was all gone into and this lad was sentenced and the Court took that into consideration in the severe sentence that was imposed upon him.

Mr. Pomeroy: The very same narcotics in the other case are the subject of this case and they are to be gone into here as much as in that.

Mr. Beardslee: I think what De La Lama knew what they intended to do might be questioned; certainly not what this witness knew.

The Court: The objection is overruled.

Mr. Pomeroy: You may read the question.

(Question read by the reporter.)

Mr. Beardslee: That is the purpose of it directed to the witness, if your Honor please, not what De La Lama was going to do with it, or you and De La Lama or anything of that kind, but what he is going to do with it.

The Court: The objection is overruled.

Mr. Beardslee: Exception.

The Court: Allowed.

Q. (By Mr. Pomeroy): You may answer it.

A. I was going to deliver it.

Q. What was it specifically that Mr. Belland did that you objected to in court when you were sentenced? A. What was it?

Q. Yes. You stated to Mr. Beardslee that you objected to something that Mr. Belland did in court. What was it?

Mr. Beardslee: He testified Mr. Belland did not tell the truth. He lied about it.

Mr. Pomeroy: I am asking the witness.

(Testimony of Lucian A. Vasquez.)

A. Well, Mr. Belland stated that I had been convicted since 1939, I believe, I am not quite sure, the record will show—that I had several convictions on assault with a deadly weapon.

Q. Well, how many convictions have you had?

Mr. Beardslee: This, if your Honor please, is not redirect examination. It is cross-examination of his own witness and certainly counsel cannot claim surprise on that record, and I don't like to have the witness annoyed and embarrassed in matters that are not material to this case.

The Court: The objection is overruled.

Mr. Pomeroy: Read the question.

Mr. Beardslee: I would like an exception on the particular grounds of the objection as of not being redirect examination.

The Court: Allowed.

(Question read by the reporter.)

A. What kind of convictions?

Q. (By Mr. Pomeroy): Any kind.

Mr. Beardslee: Well now, if your Honor please, I object to that. He might have had convictions for speeding. They cannot show any conviction in this court as respecting credibility except that of felonies. Counsel says any kind of convictions.

Mr. Pomeroy: I disagree with that law, if the Court please.

The Court: The objection is overruled.

Mr. Pomeroy: You may read the question to him.

(Answer and question read by the reporter.)

(Testimony of Lucian A. Vasquez.)

Mr. Beardslee: I'd like an exception to the Court's ruling.

The Court: Allowed. Proceed. Answer the question. A. Several.

Q. Well, as a matter of fact, didn't Mr. Belland say in court that you had had a number of convictions and included in them an arrest of assault and robbery and assault and intent to murder, isn't that what Mr. Belland said in court to Judge Bowen?

A. He did not.

Q. You state in your own words what Mr. Belland said.

A. Mr. Bowen asked Mr. Belland what he knew about the case, and Mr. Belland came up and told the Judge that I had a pretty bad record and that I had several convictions with assault with a deadly weapon. Those were his exact words.

Q. Well, as a matter of fact, Mr. Vasquez, you have had a continual record ever since you were just a youth, isn't that correct? A. Yes.

Q. And that you have served a number of sentences, isn't that correct?

Mr. Beardslee: I might suggest again to your Honor that I am going to have to renew my objection. When a person puts a witness on the stand they vouch for the truth of that witness and they cannot thereafter harass them. That might be my privilege, but it isn't counsel's. This witness has wanted to tell the truth and he has. This questioning now has gone so far afield that it has nothing whatsoever to do with the trial of this case.

The Court: Overruled.

(Testimony of Lucian A. Vasquez.)

Mr. Pomeroy: You may read the question to him.

(Last question read by the reporter.)

A. Well, if you want to call it a number, I served one.

Q. Well, you served one recently for white slave traffic act violation, isn't that correct?

A. Yes.

Mr. Beardslee: I still want the objection to run to this line of questioning, and I want the Court to allow me an exception.

The Court: Allowed. The objection is overruled and exception allowed.

Q. (By Mr. Pomeroy): It was in 1937 that you were arrested for robbery and assault to murder, isn't that correct, but you weren't sentenced on that?

A. There was no case to it. That was just on suspicion.

Mr. Beardslee: Counsel knows he has no right to ask a witness about an arrest where there has been no conviction.

The Court: The objection is sustained and the jury will disregard that last question.

Mr. Pomeroy: This isn't the defendant, if the Court please.

The Court: The ruling will have to stand. The jury will disregard the last question and answer.

Q. You claimed you needed a tapering-off cure, is that correct, when you were arrested here last March?

A. I did.

(Testimony of Lucian A. Vasquez.)

Q. And who refused you this tapering-off cure?

A. Well, everyone did so far.

Q. You said you were refused a tapering-off cure. Who is it that refused you this tapering-off cure?

A. Doctors and everyone.

Q. What doctors?

A. Well, I don't know.

Q. Where did you see the doctors?

A. I was supposed to see him in the county jail.

Q. Well, who refused you this tapering-off cure that you thought you needed?

A. Well, I don't know who refused it.

Q. You actually weren't refused any cure, isn't that a fact?

A. Well, I don't know.

Q. Why were you strongly tempted to say it was De La Lama's narcotics?

A. What do you mean, why?

Q. Well, didn't Mr. Beardslee lead you along in the questioning to where you said you were strongly tempted——

Mr. Beardslee: I was cross-examining a witness. That is not leading. And I object to counsel's last question, why did you do so-and-so, as argument to the witness.

The Court: Overruled.

Mr. Pomeroy: Read the question to him.

(Last question read by the reporter.)

Q. To accuse De La Lama, say the narcotics were his?

(Testimony of Lucian A. Vasquez.)

Mr. Beardslee: I certainly object to the form of the question, your Honor. It isn't cross-examination.

The Court: The objection is sustained.

Q. Why were you tempted to, as you say, to say——

Mr. Beardslee: I didn't hear.

Q. (Continuing): ——to say that the narcotics belonged to Mr. De La Lama when you were first arrested?

A. Are you familiar with the——

Q. (Interrupting): I am asking you the question, Mr. Vasquez. I wish you would answer it.

A. Well, I was just trying to answer it the best way I can. I can't just answer a direct question without letting you know why.

Q. You may answer the question.

Mr. Beardslee: He has asked you why.

A. Well, when a man is under the addiction like that he is cut off automatically, he will do anything in order to feel normal again.

Q. Well, did you think you would get out of it because you might say it belonged to De La Lama when the narcotics were in your automobile also?

A. Well, anything can happen.

Q. Anything can happen. I think that is what is happening now.

Mr. Beardslee: I object to counsel's remark.

The Court: Sustained.

Mr. Beardslee: I'd like to have the jury instructed to disregard it.

The Court: The jury is so instructed, and you

(Testimony of Lucian A. Vasquez.)

will disregard the comments of counsel to the government respecting present conditions.

Q. (By Mr. Pomeroy): You stated that narcotics officers told you you would remain and suffer. What narcotics officer told you that?

A. Well, whoever was handling the case.

Q. Well, where did that conversation take place?

A. In the city jail in Seattle.

Q. Did the conversation ever take place in Mr. Beardslee's office? A. No.

Q. It was in the city jail. And what officer told you that you would remain and suffer?

A. I don't remember.

Q. As a matter of fact, no one told you that, did they? A. They did.

Q. Who was present?

A. Well, there was four or five of them.

Q. You don't know the names?

A. That was while I was being questioned and I was a pretty sick man then.

Q. How long was that after you had been arrested? A. That has been last March, 1946.

Q. How long was it when this occurred after you had been arrested?

A. Oh, I'd say about two or three days.

Mr. Pomeroy: That is all.

Recross-Examination

By Mr. Beardslee:

Q. Do you know the names of any of the agents or officers that were interviewing you at the county jail other than the ones that have been mentioned here?

(Testimony of Lucian A. Vasquez.)

A. Mr. Belland for one, and some other officer, narcotic officer, he is not in court now.

Q. Oh, by the way, you mentioned your sickness. What is the reaction of you when you are suddenly cut off from the supply if you have been using it for years? A. Very bad.

Q. Explain to the Court and jury the nature of the suffering and how soon it hits you when you are cut off after you have used it as long as you did.

A. Well, you have the effects of it immediately after, from five to six hours. And from then on, on the 24th hour is when it gets really bad. You are having all kinds of hallucinations and everything like that, and just feel like you are going stark, raving mad or something.

Q. Does it affect your ability to sleep?

A. It affects everything. I couldn't sleep the three days that I was in jail. I had to lay awake and pace the floor all the time.

Q. Could you eat or anything of that kind?

A. You can't eat, you can't sleep, you can't do anything.

Mr. Beardslee: I think that is all.

Redirect Examination

By Mr. Pomeroy:

Q. How were you using the narcotic?

A. I was taking it by mouth.

Q. In what form? A. Liquid form.

Q. How much would you take at a time?

A. Oh, just enough, I suppose. I don't know.

(Testimony of Lucian A. Vasquez.)

Q. You took it out of this bottle——

A. Yes.

Q. ——that was found on you when you were arrested? A. Yes.

Q. And how often would you take a shot of this liquid opium just immediately prior to the time you were arrested? How often would it be necessary for you to take a shot of this liquid opium?

A. Oh, I'd say every five or six hours.

Q. And all this trip up from Phoenix with De La Lama you were taking these shots, is that correct? A. That is right.

Q. All the time you were in Seattle prior to the time you were arrested? A. Yes.

Q. And Mr. De La Lama didn't know you had any of this on you?

A. Well, I had it in a bottle, I could go in a rest room or anywhere and take it. I didn't have to do it in his presence.

Q. (By Mr. Beardslee): Incidentally, tell us what it looks like. I wouldn't know. I don't think counsel would. What does it look like?

A. Oh, just any medicine bottle.

Q. (By Mr. Beardslee): I mean the solution, what color is it? A. It is black; dark brown.

Q. (By Mr. Beardslee): Something like the color of cascara? A. Yes.

Mr. Beardslee: That is all.

The Court: Step down. Call Plaintiff's next witness.

(Witness excused.)

GILBERT L. BELLAND

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Detective sergeant Gilbert L. Belland.

Q. And what is your occupation?

A. In charge of the Seattle Police Narcotic Detail.

Q. And in this occupation with the Seattle Police you work closely with the Federal narcotic officers?

A. Yes, sir.

Q. Do you know the defendant here, Robert De La Lama?

A. Yes, sir.

Q. And do you know the man who just preceded you on the stand, Mr. Vasquez?

A. Yes, sir.

Q. How long have you known who those men are?

A. First saw them about 11 o'clock a.m., March the 23rd, 1946.

Q. Where did you see them?

A. On Fourth Avenue opposite the Trenton Hotel.

Q. Where is the Trenton Hotel located?

A. Northwest corner of Fourth and Cherry.

Q. And what did you observe about them at that time?

A. Well, they drove up in that Arizona car and parked opposite the hotel. Lucian Vasquez came

(Testimony of Gilbert L. Belland.)

down to the corner of Fourth and Cherry on the east side of the streets, crossed over to the west side——

Q. (Interrupting): With whom were you at the time, or were you alone?

A. I was by myself.

Q. All right.

A. Then he went north and entered the Trenton Hotel, was gone about three or four minutes.

Q. Where was De La Lama at this time, the defendant? A. He was in the car.

Q. Who was driving the car?

A. Vasquez drove the car up there and parked it there, and De La Lama a little later got out and put a nickel in the traffic proposition, and then got back in the car. And Vasquez came out of the hotel, he motioned to De La Lama to proceed, and De La Lama drove the car north and Vasquez then got into the car. And at that time I tailed them up towards Frederick and Nelson's; over on Sixth or Seventh I lost them.

Q. When did you next see these two men?

A. At 1:30 p.m.

Q. And where did you see them at that time?

A. They came into the entrance of the Trenton Hotel. Myself, together with Officer O. K. Holschumaker, was stationed there and as they started up the stairway I called them to halt, placed them under arrest and searched them. And upon searching Vasquez I found a jar of opium.

Q. Who had the keys to the car?

A. Well, we marched up towards Fifth Avenue,

(Testimony of Gilbert L. Belland.)

and at that time Vasquez didn't have the keys, so I searched De La Lama and De La Lama had the keys on him.

Q. De La Lama had the keys to the car?

A. Yes, sir.

Q. And then what did you do with these two men?

A. Well, Vasquez opened—after I had gotten the keys from De La Lama, he opened the back of the car and gave me a jar of opium, and then I looked in the glove compartment and found a bottle of solution, opium solution.

Q. That was in the glove compartment?

A. Yes, sir.

Q. And where was the first jar that you found?

A. That was in his—I think his left coat pocket.

Q. It was on his person; is that right?

A. Yes, sir; Vasquez.

Q. And then what did you do with these two men? A. They was placed in jail.

Q. When did you find the additional bottles, the 13 jars of opium?

A. About 11 p.m., Monday night, Vasquez took us to the automobile, or he was with us and wanted to go to the automobile, he would turn over some additional jars. He indicated prior to that time that he had them planted some place.

Q. What is that?

A. He had indicated prior to that time that he had them planted out some place.

(Testimony of Gilbert L. Belland.)

Q. Had the car been searched prior to the time, by the police officers?

A. Just a surface search, and it was sent up to the garage for confinement.

Q. And then on this Monday night, what happened then concerning receiving these other 13 jars of opium?

A. Well, I took, in the presence of the narcotics agent, after he had crawled in there and dug them out and turned them over to me, I retained them and the following morning made a search for fingerprints and none was obtained. And about noon-time I turned them over to Federal narcotic agent Henry Giordano and Harold Moody. Agent Graben also was there, I believe.

Q. What was said about De La Lama's connection with these narcotics?

Mr. Beardslee: Just a minute, if your Honor please. I would like to know what was said by whom after arrest. Even a statement made in the defendant's presence would not be admissible against him.

Mr. Pomeroy: I will withdraw the question if you object to it.

Q. What did you do with De La Lama? What did you eventually do with Mr. De La Lama in that case?

A. I released him from the city jail at midnight.

Q. Did Mr. Vasquez at that time take the responsibility for the narcotics?

A. Yes, sir.

(Testimony of Gilbert L. Belland.)

Mr. Pomeroy: Will you mark these, please?

(Plaintiff's Exhibit 1, photograph, was marked for identification.)

(Plaintiff's Exhibit 2, photograph, was marked for identification.)

Q. Handing you what has been marked as Plaintiff's Exhibit 1 and Number 2 for identification, will you state what those exhibits are, if you know?

A. Exhibit No. 1 is the jar of opium taken——

Q. It is a reasonable facsimile, is that right?

A. Sir?

Q. It is a picture?

A. It is a photograph, picture, of a jar of opium containing my handwriting and initials on it there.

Q. That is on what jars now, on that exhibit No. 1?

A. Exhibit No. 1 and where it was taken from.

The Court: He asked you what jar.

A. No. 1 is the jar that was taken from the person of Vasquez at the time of his arrest. No. 2 jar was given to me by Vasquez from the rear of his automobile. No. 3 is a bottle of solution that I took out of the glove compartment of his automobile.

The Court: Now those three are pictured in what exhibit for identification?

A. The exhibit here is No. 1.

Q. (By Mr. Pomeroy): Exhibit No. 1 for identification. Now tell us what exhibit No. 2 is, for identification?

(Testimony of Gilbert L. Belland.)

A. Exhibit No. 2 consists of a picture of 13 jars of opium that was found in Vasquez's car and turned over to me by Vasquez, in the presence of the narcotic agent.

Q. Now those jars there had a label on them, is that correct? Each jar had a label on it?

A. I placed the label on it.

Q. Did each jar have a label on it?

A. No, they didn't have any labels on them.

Q. Well, did you put a label on them?

A. There is my label. I put them on them.

Q. That is in your handwriting, is that right? Does your signature appear on those labels?

A. My initials. I typed these with my typewriter, on Exhibit 2 I typed them out with the typewriter and it is my initials on it.

Q. Your initials on it? A. Correct.

Q. And what did you do with those jars that are pictured in exhibits No. 1 and 2 for identification?

Mr. Beardslee: I object as not material, if your Honor please. There has been nothing here yet to connect up this defendant with the jars. The testimony has just been to the contrary.

The Court: Overruled.

Mr. Beardslee: Exception.

The Court: Allowed.

A. Exhibit No. 1 was turned over to federal narcotic agent Giordano in the afternoon on March the 25th, and Exhibit No. 2 was turned over to narcotics agents Giordano and Moody, Graben, I think, about noontime of the 26th.

(Testimony of Gilbert L. Belland.)

Q. In other words, you mean that the jars pictured in Exhibit No. 1 for identification were turned over at a certain time and the jars pictured in Exhibit No. 2 were turned over at a certain time?

A. That is right.

Q. Were you present yesterday in my office when Mr. Vasquez was also in that office?

A. Yes, sir.

Q. Were you present when any promises were made to him of any kind?

A. I didn't hear any promises made to him.

The Court: At this point the court will be at recess for ten minutes.

(Short recess.)

The Court: All are present as before. You may proceed.

Q. (By Mr. Pomeroy): Mr. Belland, yesterday afternoon you were in my office with Mr. Vasquez, is that correct?

A. Yes, sir.

Q. And who was present at that conversation that was held at that time?

A. Federal narcotic agent Henry L. Giordano, yourself, Vasquez and myself.

Q. State generally what the conversation was that took place at that time.

Mr. Beardslee: Object to the form of the question, if your Honor please, because it does not give me an opportunity to object to any question that might be growing from that answer.

Q. Was there a conversation between the man

(Testimony of Gilbert L. Belland.)

Vasquez and me concerning his testimony on the stand today? Did we have a conversation about it?

A. Yes, sir.

Q. And did I ask him certain questions and he answered the certain questions?

A. You asked him if——

Q. (Interrupting): Did I ask him certain questions and did he answer certain questions?

A. Yes, sir.

Q. All right, state what you remember of those questions and answers.

A. You asked him what his part was in coming to Seattle with that load of opium, and his answer was that he was just making the delivery, and that the opium belonged to Robert De La Lama and that in making the deliveries if they got arrested he would take the rap.

Mr. Beardslee: I might suggest to your Honor again, and I really wanted to make formal objection, the defendant was not present up there when that conversation took place. What difference does it make whether Vasquez says something or whether I said something or Mr. Gemmill or anyone. It couldn't be used in evidence as against this defendant unless he was there and refused to deny the statements that were made. It is definitely hearsay, your Honor.

Mr. Pomeroy: I agree with that. I think it is. He didn't make an objection before so I was getting the evidence. So I will withdraw the question

(Testimony of Gilbert L. Belland.)

now and ask him not to answer any further now that objection has been made. I agree with your objection.

The Court: The jury will disregard that last answer of the witness as to what was said about Mr. De La Lama. That part of the answer which related to what the witness said about De La Lama will be disregarded by the jury. Lay it out of your minds as if it had not been said in your presence, it being stricken from the record.

Q. (By Mr. Pomeroy): Mr. Belland, how long have you been with the Seattle Police Department?

A. Just a little over twenty-five years.

Q. And what facilities for medical attention do you have down in the Seattle city jail for medical attention for prisoners?

A. Well, there is a physician assigned to the city hospital there that cares for all the prisoners when they are in need, makes examinations. The ones that are arrested, they are usually brought direct to the city hospital for check-up.

Q. And the hospital is right in the same building as the jail, isn't that correct?

A. On the floor below.

Q. And how many years have you been connected with the narcotics end of the law enforcement?

A. I have had charge of the narcotics detail area since July the first, 1934, with the exception of two years that I had charge of the bunco detail.

Q. And during this period of time in dealing

(Testimony of Gilbert L. Belland.)

with narcotic addicts, are they usually examined and given hospital treatment or medical treatment if necessary when prisoners of the city of Seattle?

Mr. Beardslee: Objected to, if your Honor please, as to what the custom may be and what is usually done. I think we are only concerned with the facts in this case. Object to what the custom may be.

The Court: Sustained. The Court wishes to be understood as pausing for a moment when objections are made to give opposing counsel an opportunity to state the theory on which the question is based. Proceed.

Q. (By Mr. Pomeroy): Was Mr. Vasquez denied the facilities of your hospital or city physician during the time that he was incarcerated in the Seattle city jail?

A. Not to my knowledge he wasn't denied it. He may have had some little difficulty in view of the fact that he had a stomach habit and perhaps he didn't want to use the needle.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Beardslee:

Q. You actually, Lieutenant, would not know whether he received treatment or whether treatment was afforded to him, would you?

A. I don't recall what I did or did not do.

Q. You mentioned if he had been in the habit of mixing up this opium or something, and taking it in liquid form?

A. That is right.

(Testimony of Gilbert L. Belland.)

Q. He was a pretty sick boy while he was in there, wasn't he? A. Yes, sir, he was sick.

Q. And he was sick because he could not receive his narcotics, his supply was cut off upon his arrest, isn't that true?

A. I would have to check the record. It doesn't seem——

Q. (Interrupting): Well, Lieutenant, I'd like the jury to have a clear picture of what happens to a man that has been an addict. I believe Vasquez said he had been since 1937.

Mr. Pomeroy: He didn't say, as I recall.

Q. (By Mr. Beardslee): From the time of his operation. Well, anyway, a period of three or four years. You in your experience on the police narcotics squad have observed many addicts, have you not? A. Yes, sir.

Q. Under arrest and all. Will you tell the jury, please, in your experience and as an expert what happens to an addict when he is suddenly cut off from his supply and placed in jail or in confinement? What is his physical and mental reaction?

A. An addict is placed in jail and has a severe habit, he has what is known as withdrawal symptoms. And those symptoms are vomiting and dizziness and reactions of the contracting of the muscles, particularly in the calves of their legs and arms, and more or less nauseated.

However, it has been the practice of the city physician when an addict comes in in a condition like

(Testimony of Gilbert L. Belland.)

that, they administer about, sometimes a half or a quarter and where they start off with a——

The Court (Interrupting): A quarter gallon or a quarter something else?

A. Of a grain of morphine, and the next day an eighth, the following day a sixteenth, and then they don't get any more. Usually the withdrawal covers about three days and after that period they don't get any more. Usually they are sent over to the County and I don't recall that they ever get anything over there.

Q. That is what you call a reduction cure, is it not, where they start tapering them off?

A. That is right. It is rather fast, but it is effective.

Q. Then you spoke of nausea, they are nauseated. And they also lose control of all muscular reflexes, including the sphincter muscle? That is true, isn't it?

A. Yes, sir.

Q. And when a person has been suddenly cut off they will do almost anything to obtain narcotics, will they not?

A. It varies upon their mental conditions. Some are stronger-minded than others.

Q. But they do get so sick that they would trade their respect in society and everything else in order to obtain narcotics, would they not?

A. Some do.

Q. All right. Within your experience hasn't it been true that prisoners have been tortured, that you know to be addicts, they have been withheld

(Testimony of Gilbert L. Belland.)

from the administration of it in order to obtain statements from them?

A. I don't know as that is a fact. Sometimes the doctors don't get to them as regularly as they perhaps would like to have the doctors come and take care of them, and——

Q. Isn't it true, though, that what we will refer to as the average hophead, that he is arrested, he will almost tell any kind of a story in order to obtain relief from his suffering, suffering occasioned by a sudden cutting off of his supply?

A. They do lie terribly to the doctor, yes. They tell them they have got a ten-grain habit when as a matter of fact they haven't got only perhaps a grain and very fortunate to be able, in their line, of being able to supply that.

Q. When you questioned Vasquez he was not suffering at first after his arrest, was he?

A. No, he seemed quite normal.

Q. He was all right, was he not, when he told you that De La Lama knew nothing about the opium that he, Vasquez, had in his car?

A. Well, that was his statements all through from the beginning to the end.

Q. Well, I mean he wasn't suffering when he first made the statement?

A. No, he wasn't.

Q. He didn't have any hallucinations or anything of that kind then? A. No.

(Testimony of Gilbert L. Belland.)

Q. Then even after he commenced to suffer he still told you the same thing that he had advised you when he first was arrested, is that correct?

A. That is correct.

Q. Counsel asked you about the session yesterday afternoon, you said you were present. Mr. Pomeroy was not in the office all of the time that Vasquez was being questioned, was he?

A. I believe he stepped out for a moment.

Q. It is customary, is it not, for an officer desiring to elicit testimony to promise to recommend some leniency or something in exchange for the testimony that he would be inclined to give?

A. I don't know as there is any promises that you could give them.

The Court: He asked you if it was customary to give promises.

The Witness: Not to my knowledge.

Q. (By Mr. Beardslee): Well, all right, supposing three people are arrested and charged with an offense and you don't have much evidence on them. You wouldn't hesitate to recommend a suspended sentence for the one fellow that you figure was necessary as a State witness in order to obtain a conviction against the other two, would you?

The Court: The question is would you hesitate like you are now doing, or hesitate at all?

The Witness: Read that question again.

Q. (By Mr. Beardslee): Supposing three people were arrested, charged with some serious offense. The only way you could obtain evidence sufficient

(Testimony of Gilbert L. Belland.)

to convict would be from one of those three people. You would recommend a suspended sentence for one of the three in order to obtain a conviction against the other two, would you not?

A. The prosecuting attorney's office does that, yes.

Q. And in this instance was there any doubt in your mind but what Vasquez was telling the truth when he said that if he would come over and testify against De La Lama, the defendant in this case, that they would try to effect an early parole or release for him?

A. I don't know as I understand that.

Q. Well, let's see. I think Vasquez may have been mistaken in his identify of the officer, but he did say that Belland—may have said Belland, I don't know. I thought he said Belland and someone else came over to see him at the pen. Was that you or—there is a Joe Bell that is a narcotics officer here. I was just wondering whether you were the one he was referring to or was it Bell, that interviewed him at the pen.

Mr. Pomeroy: Object to the form of the question.

Mr. Beardslee: I was trying to clarify it.

Q. In that interview with him did you or an officer with you suggest that you would recommend an early parole if he would come over and testify against De La Lama?

A. I interviewed him at the McNeil Pen over a period of about three minutes, which we are allowed. I explained to him that we had his part-

(Testimony of Gilbert L. Belland.)

ner, De La Lama, in jail, and we were going to try to convict him, thought we had sufficient evidence without him, but if he wanted to come over and testify and tell the Court now that we found out who actually owned the stuff, that he would be smart in coming over and testifying. "It is up to you whether you want to testify or not."

Q. "Don't hesitate," all right, about being frank in this.

Mr. Pomeroy: I will object to this argument.

The Court: Sustained.

Mr. Beardslee: We all do it. It isn't argument.

The Court: Sustained.

Q. You did say then it wouldn't hurt him to come over and testify?

A. That was left up to his judgment.

Q. Surely. I realize that. But the inference was that if he would come over and testify that it might help him towards effecting an early parole as against a later parole, isn't that true?

A. He realized no one could make him any promises.

Q. Was it suggested or inferred that if he would come over and testify against De La Lama that there would be a recommendation for an early parole or release from the pen for Vasquez?

A. I don't think it was in any form like that.

The Court: Do you care to make a statement as to how in reality it was?

The Witness: My request was to him that we would like to have him come over and testify and tell the Court the truth now that we found out who the actual owner of it was.

(Testimony of Gilbert L. Belland.)

Mr. Beardslee: That isn't in response to my question. I object to it. The answer isn't responsive. I merely wanted to know, if your Honor please, whether any offer or any suggestion was made that he could benefit himself.

The Court: Will you read the question and also the answer? I would like to suggest that the Court had the impression, Mr. Belland, that you take too much time in responding to counsel's questions. And I would like to have you expedite the making of answers to the questions. Will you read the question and the answer?

(Question and answer read by the reporter.)

The Court: The objection is overruled. I thought that he made some objection as not responsive, and that is overruled.

Mr. Beardslee: Well, there was more occurred after that. He went on to something that wasn't responsive.

The Court: The question of the Court and the answer will be stricken and the jury instructed to disregard it. Propound another question.

Q. (By Mr. Beardslee): Was there a promise made or a promise indicated or inferred of any kind to Vasquez when he was interviewed at the penitentiary, that you know of?

A. Proceed.

Q. Did you understand?

A. I made the remark that it perhaps wouldn't do him any harm if he did that. What inferences he received from it I don't know.

(Testimony of Gilbert L. Belland.)

Q. Now, Lieutenant, you went into this case quite thoroughly when the arrest was made, did you not? A. Yes, sir.

Q. And you caused some investigation, I presume, to be made of Mr. De La Lama?

A. Through the narcotics agents investigation was made.

Q. And isn't it true that I was permitted to be present in the city jail I believe the Monday following the Saturday night on which they were arrested?

A. I remember you being there, sir.

Q. And I insisted that I had a right to see my client, Mr. Vasquez? A. Correct.

Q. You might not remember offhand who were present, but it is my recollection that Harold Moody was present? A. Yes, sir.

Q. And was he a Federal narcotics officer?

A. He was.

Q. Is he available so he could testify as to what transpired? A. I don't believe so.

Q. It is my understanding that he is ill or incapacitated, is that true? A. Yes, sir.

Q. And I don't recall—there were some other city officers there too, were there not?

A. No. They just participated in the arrest but not in any——

Q. (Interrupting): No, no, no, I mean that evening when I was down in the conference.

A. I don't recall.

Q. Do you recall whether a Joe Bell was there?

A. I do not.

(Testimony of Gilbert L. Belland.)

Q. The agent here in court was present, was he, sitting in the back row alongside of Bob Stewart there, in the brown suit?

A. Giordano may have been there. I don't recall.

The Court: How do you spell his name, so that all those present will be able——

The Witness: Henry L. Giordano. G-i-o-r—
G-i-r-a-d-a-n-o.

The Court: Raise your voice a little higher so that all those present can hear you. Speak up distinctly and clearly and promptly.

Q. Well, everyone there, Lieutenant, participated in the investigation of that case, the seizure of the opium involved in this hearing, is that true?

A. That is correct.

Q. And it is also true that Mr. Vasquez was interviewed at a considerable extent?

A. He was.

Q. And not in the presence of De La Lama on all occasions?

A. That is right.

Q. And wasn't De La Lama interviewed separately to quite some extent by all the officers interested, separate and aside from Vasquez who just testified this afternoon?

A. He was interviewed separately from Vasquez.

Q. And after all of your interviews and the checking of all records, both by the police department and the Federal narcotics squad, you came to the conclusion that De La Lama, the defendant in this case, had no interest in that opium, did you not?

A. He was released.

(Testimony of Gilbert L. Belland.)

Q. He would not have been released if you or the Federal officers or anyone else voiced any objection or considered, after your thorough investigation, that he had any interest in the opium, would he have been?

A. It is a question of what you can prove.

Q. What?

A. It is a question of what you can prove.

Q. Do you recall when the defendant in this case was released from that arrest with respect to the date of the arrest? I don't care for the dates.

Two days, three days, four days after it?

A. He was released about 11 o'clock. Vasquez told us about the 13 jars and we took him up there and that was turned over to me. And then we came back to the city jail and he wanted De La Lama released, and I made out releases for him. And he also wanted \$500 of De La Lama's money and De La Lama released to him \$500 which was placed in Vasquez' account. And he was put on the street immediately thereafter.

Q. Well, this \$500 you are talking about is the \$500 or more that Vasquez gave De La Lama right at the time of the arrest, told him to "keep this, I may have to go to jail"? Isn't that right?

A. I didn't hear that, sir.

Q. At the time that they were apprehended the first thing Vasquez did was to shove his wallet over to De La Lama, isn't that so?

(Testimony of Gilbert L. Belland.)

A. No sir. Vasquez had about \$1507 on him, and De La Lama had nine hundred seventy something. And they were discussing the amount of bail they would have to put up, and Vasquez wanted to be able to make bail and he got \$500 from De La Lama.

Q. Yes. But what I am getting at, right at the time of the arrest, the apprehension of these people, Vasquez immediately handed over some funds to De La Lama, told him, "You will probably be on the outside. I will be in. Use this to get me out."

A. No transfer was made.

Q. Who was present at the time of the arrest?

A. I was.

Q. And who else?

A. They both had their hands up in the air. They could not have made any transfer.

Q. Who went out there?

A. Officer O. L. Holschumaker, and they were handcuffed.

Q. All right. And how did you take them to the jail?

A. When I got up about half ways to Fifth Avenue——

Q. Did you walk up or go in the car?

A. Walked up.

Q. All right.

A. And then I couldn't find the keys on Vasquez, and so I searched him and found the keys on him.

The Court: On whom?

The Witness: On De La Lama.

(Testimony of Gilbert L. Belland.)

Q. (By Mr. Beardslee): All right. Isn't it true that you started walking up towards the jail, that Vasquez told De La Lama, "Well, you probably will be on the outside. Take this and try to get me out of jail", or words to that effect? I may not be quoting him exactly.

A. Vasquez drove his car down with me in it from where it was parked to the police station and De La Lama was brought to the station by the other officer.

Q. Yes, but you say you started walking down the street together. I want to know what happened at the time of the arrest. Isn't it true that Vasquez turned over his belongings to De La Lama?

A. No sir.

Q. At that time? A. No sir.

Q. Did he turn over any belongings to De La Lama?

A. Not to my knowledge, he couldn't have turned over anything.

Q. Did he tell De La Lama that he probably wouldn't be in jail but he was afraid he would and for him to try to make arrangements for him to get out of jail and to trial? Was this Officer Holschemaker that was with you at the time of the arrest?

A. Officer Holschemaker was in the rear of me when I made the arrest and stepped up and helped handcuff one of them.

Q. Well, were you present on one occasion when Officer Holschemaker told me what had happened?

(Testimony of Gilbert L. Belland.)

Mr. Poméroy: I will object to this, if the Court please, on the ground he can subpoena Officer Holschemaker.

The Court: The objection is overruled.

Mr. Beardslee: I don't think it will be easy.

The Court: The Court's ruling dispenses with it. His objection is overruled.

Mr. Beardslee: Oh.

Q. (By Mr. Beardslee): Were you present at any time when I had a conversation with Officer Holschemaker with respect to what happened immediately after the arrest in this case?

A. I don't believe so, because Holschemaker and his partner stepped right out of the picture immediately after the arrest, because I took over the investigation from then on. They helped me get them to the office.

Q. I see. Well then, to the best of your recollection at this time you do not remember and have not learned whether Vasquez handed anything over to De La Lama with instructions for him to get an attorney for him or anything of that kind? You don't remember any such thing of that nature?

A. Well, I remember he came down and he turned some money over to you or something. I got a release for it or something.

Q. By whom was that release signed?

A. I think you got a release for some of his money as his counsel. But that has nothing to do with the \$500 that was taken from De La Lama's account and transferred to Vasquez at the booking office, and had to be signed by them.

(Testimony of Gilbert L. Belland.)

Q. Vasquez was the one that had most of the money in his possession, isn't that true?

A. So that he would be able to make his bail eventually.

Q. Now in the course of your investigation before releasing De La Lama you learned, did you not, that he was on his way over here to visit a brother in Tacoma?

A. That is what I was told by both De La Lama and Vasquez.

Q. The Federal agents indicated that he did have a brother in Tacoma? A. Yes.

Q. It wasn't until after you satisfied yourself that you turned De La Lama loose? That is true, isn't it?

A. Well, he didn't have any opium in his possession, and Vasquez asked if we would turn him loose inasmuch as he didn't have anything on him, and it was all his, he didn't have anything to do with it. He just come up here for the ride, and they were leaving that afternoon, the afternoon we arrested them. And I was very happy to get the 13 jars of opium out of circulation.

Q. And it was Vasquez' car, was it not?

A. Well, that was turned over to the government, yes.

Q. And I believe you said that you had made a cursory examination of it. That is, you and other officers made the cursory examination of the car?

A. That is right. We didn't make a thorough search of it.

(Testimony of Gilbert L. Belland.)

Q. And was this opium so concealed that a thorough search would be necessary in order to find its whereabouts?

A. Well, just a quick search wouldn't find it.

Q. You would not find it.

A. That is right.

Q. So it is a car that you or I might be riding in, if we were unsuspicious we certainly wouldn't run across it or know where it was?

A. That is right.

Mr. Beardslee: Redirect?

Mr. Pomeroy: No questions.

(Witness excused)

Mr. Beardslee: Oh, I'd like to ask one more question, if your Honor please.

The Court: Can you do so from where he is now?

Mr. Beardslee: Yes.

Q. (By Mr. Beardslee): Were you here when Vasquez testified this afternoon? A. Yes.

Q. And was his story today, his testimony, the same as what he told you at the time of the arrest and while he was in jail up there, in substance?

A. Pretty much the same. The story was that it was all his.

Q. Well, all I want to know, is the testimony he gave today appreciably in substance the same as what he told you at the time of his arrest?

The Court: With reference to what particular subject?

(Testimony of Gilbert L. Belland.)

Mr. Beardslee: With respect to the opium, who owned it, and whose car it was, and whether De La Lama had interest in it or knew anything about it?

A. His story yesterday wasn't—

Q. No, no, no. The testimony today compared with the story at the time of his arrest when you released De La Lama?

A. Yes, that part of it was substantially the same. He stuck to his story at that time, that it was all his and De La Lama didn't have anything to do with it.

Q. In other words, he has testified to the same thing he told you when he was first arrested?

A. That is right.

Mr. Pomeroy: Mr. Belland may be excused for the rest of the afternoon?

The Court: Agreeable?

Mr. Beardslee: Yes, your Honor.

The Court: Granted.

(Witness excused.)

HENRY L. GIORDANO

a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Henry L. Giordano, G-i-o-r-d-a-n-o.

Q. And what is your occupation?

(Testimony of Henry L. Giordano.)

A. Narcotics agent for the Federal Bureau of Narcotics, Seattle.

Q. What year did you start to work there?

A. 1941.

Q. Mr. Giordano, do you know the defendant, De La Lama? A. I do.

Q. And do you know Vasquez? A. I do.

Q. When did you become acquainted with these two?

A. The first time I saw the defendant De La Lama and Vasquez was on the morning of March 23, 1946.

Q. And where was that?

A. That was in the vicinity of Fourth and Cherry.

Q. Were you alone or with someone?

A. I was alone at that time.

Q. And state what you observed at that time?

A. At that time I observed a 1940 Oldsmobile convertible drive up and I observed Vasquez get out of the automobile and go into the Trenton Hotel at the corner of Fourth and Cherry. I observed the defendant De La Lama get out of the car and walk up and down the street, and get back into the automobile. A short time after that I saw Vasquez come out of the Trenton Hotel, motion to De La Lama in the automobile and De La Lama started the automobile and drove to the corner where he picked up Vasquez.

They drove up town and I followed them and they made several turns up there in the downtown sec-

(Testimony of Henry L. Giordano.)

tion, eventually parked the car in the Roosevelt Hotel Garage.

Q. When did you next see them?

A. I next saw them on March 25, 1946.

Q. And where was that?

A. That was at the city jail.

Q. That was after they had been arrested as described by Lieutenant Belland?

A. Yes, sir.

Q. Will you hand him Exhibits 1 and 2, please? You are being handed what are marked Exhibits 1 and 2. Will you state what those are, if you know?

A. Exhibit 1 is a picture of two jars of opium, smoking opium, and a bottle of opium solution that was turned over to me by Detective Belland at the city jail on March 25, 1946.

Q. And the markings on there, are those your initials on there?

A. My initials are on each of the jars and on the bottle. And Exhibit No. 2 is a picture of 13 jars of smoking opium that I observed Lucian Vasquez take out of the hidden compartment of his automobile and turn over to Detective Belland, who the following day turned over to me these 13 jars of smoking opium.

Q. Now these jars, the 13 jars and also the other 2 jars and the bottle, what did you do with them after having received them from Lieutenant Belland?

A. Well, I took them down and had them photographed, and then I took them to the U. S. Chemist, Hugo Ringstrom.

(Testimony of Henry L. Giordano.)

The Court: Will you spell your last name?

The Witness: G-i-o-r-d-a-n-o.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Beardslee:

Q. You weren't present at the time of the arrest, were you? A. I was not.

Q. Were you present in the city jail at the time De La Lama was released, two or three or four days after the arrest?

A. I was there that evening. I wasn't present right at the time he was released.

Q. But everyone consented to his being released?

A. Yes, sir.

Q. That is both Federal as well as police narcotics. And the consent to the release was given after both Mr. De La Lama and Vasquez had been interviewed together and separately?

A. That is correct.

Q. And when was that approximate date? I am sorry I don't recall it. Around March.

A. The approximate date of what?

Q. When he was arrested and when he was released. Was that in March, 1946?

A. He was released March 25, 1946.

Q. A period of about 14 months ago?

A. Approximately.

Mr. Beardslee: I have no further questions.

Mr. Pomeroy: Step down.

(Witness excused.)

WALTER G. GRABEN

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pomeroy:

The Court: Will you take the witness chair and state your name and spell your last name?

The Witness: Walter G. Graben, G-r-a-b-e-n.

Q. (By Mr. Pomeroy): And what is your occupation, Mr. Graben?

A. I am Narcotics Inspector with the Bureau of Narcotics.

Q. You are being handed exhibits 1 and 2 marked for identification. Will you state what those are, if you know?

A. Those are photographs of jars of opium and an opium solution.

Q. And did you have those jars in your possession?

A. I did, yes.

Q. From whom did you receive them?

A. I received them from Hugo Ringstrom, the chemist.

Q. And what happened to those jars of opium?

A. They were destroyed.

Q. And what authority was it that destroyed them? I say, what was the authority to destroy them? What was the usual procedure, or what is the procedure that causes the narcotics bureau to destroy jars of opium?

A. When a case has been—when the evidence has been entered—I didn't just—

(Testimony of Walter G. Graben.)

Q. Well, I say, the usual procedure and what happens to evidence after a case is closed is that the Narcotics Bureau gives the evidence or sends it to a hospital, is that correct?

A. Yes, that is correct. The narcotics are either destroyed if they are not fit to be used, or the usable sort, and those that are valuable or could be used and are in such a condition as are fit for use, those are sent to hospitals.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Beardslee:

Q. This case was closed at the time you caused the opium to be destroyed, was it not, as far as your office was concerned?

A. It was considered closed at that time.

Q. That is, I presume, after Vasquez had pleaded guilty and been sentenced.

A. Yes.

Q. And then you proceeded to destroy it?

A. Yes.

Mr. Beardslee: That is all.

Mr. Pomeroy: You may step down.

(Witness excused.)

HUGO RINGSTROM

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Hugo Ringstrom, R-i-n-g-s-t-r-o-m.

Q. What is your occupation, Mr. Ringstrom?

A. Chemist for the Alcohol Tax Unit.

Q. That is part of the United States Treasury Department? A. Yes, sir.

Q. And as such do you make chemical analyses for the Narcotics Bureau? A. Yes, sir.

Q. The Narcotics Bureau is also part of the U. S. Treasury Department, is that correct?

A. Yes, sir.

Q. Mr. Ringstrom, directing your attention to what is marked exhibits 1 and 2, marked for identification, do you recognize what those exhibits represent? A. Yes, sir.

Q. And you recognize those labels on there?

A. Yes, sir.

Q. And jars such as were pictured there, were there jars such as that delivered to you?

A. Yes, sir.

Q. And what were they known as by you, what case? A. The Vasquez case.

Q. The Vasquez case. And you have an independent recollection of that case, do you?

A. Yes, sir.

(Testimony of Hugo Ringstrom.)

Q. And did you cause—what did you do with them after you had analyzed the contents?

A. I sealed them and turned them over to Narcotics Agent Graben.

Q. What did your analysis show as to the contents of all those jars?

Mr. Beardslee: I might suggest that that has been reduced in evidence, and I think it is incompetent. They have not been connected up with this defendant in any way. That will be the basis of my objection to the admission of exhibits 1 and 2 when they get around to it. All this testimony so far is to the effect that this defendant knew nothing about it, didn't have it in his possession. So I object on the ground that it is incompetent, and immaterial, probably prejudicially so.

Mr. Pomeroy: There is evidence before the Court, in fact Vasquez himself testified today that these jars contained opium.

The Court: You mean those pictured in these exhibits?

Mr. Pomeroy: No, no, the opium that he had in the automobile that he drove up here from Arizona with Mr. De La Lama in, and the connection has been that Belland testified the jars came from this car, and from Mr. Vasquez, they went to Mr. Giordano, Mr. Giordano testified he gave them to Mr. Ringstrom, Mr. Ringstrom testified he gave it to Mr. Graben. Mr. Graben testified it was destroyed, and the connection has been made all the way through.

The Court: But what connection is there with

(Testimony of Hugo Ringstrom.)

what is shown by these pictures, marked Plaintiff's Exhibits 1 and 2?

Mr. Pomeroy: I don't think my question referred to the pictures, if the Court please.

The Court: Read the question.

(Question read as follows: "What did your analysis show as to the contents of all those jars?")

The Court: How many questions would you say it took you to develop the identity of the jars taken from the automobile in question, or Vasquez, with this question you now ask?

Mr. Pomeroy: Mr. Ringstrom stated he had an independent recollection of the Vasquez case, and that these jars in the picture were those in the Vasquez case. But he had an independent recollection of the analysis of the Vasquez case.

The Court: The objection is overruled. He may answer that.

Mr. Beardslee: I would like to make clear the purpose of the objection, your Honor, was that we are just wasting time talking about the Vasquez case and there has been no connection between this opium and De La Lama. In other words, testimony has been just to the opposite, that De La Lama had nothing to do with it.

The Court: The ruling will stand.

Mr. Beardslee: Exception.

The Court: Allowed.

Mr. Pomeroy: Will you now read him the question, please?

(Question was again read by the reporter as

(Testimony of Hugo Ringstrom.)

follows: "What did your analysis show as to the contents of all those jars?")

A. All the jars contained smoking opium and the bottle contained a solution of opium.

Q. Directing your attention to the two jars contained in the picture, as shown in the picture Exhibit No. 1, what quantity did you find in those jars?

Mr. Beardslee: Objected to, if your Honor please, as having no bearing on this case unless it is better connected up with the defendant. It is immaterial, prejudicial.

The Court: The objection is overruled.

Mr. Beardslee: Exception.

The Court: Allowed.

A. One jar contained 3 ounces, and the second jar contained 3 ounces and 150 grains.

Q. Now, directing your attention to the exhibit No. 2, how much did you weigh as being the quantity contained in those 13 jars?

A. 54 ounces, 20 grains.

Q. Will you repeat that, please?

A. 54 ounces and 20 grains.

Mr. Pomeroy: You may inquire. Cross-examination?

Mr. Beardslee: No, thank you.

(Witness excused.)

The Court: You may step down. Call your next witness.

(Discussion between Court and counsel.)

The Court: I think we ought to stop here now. The further proceedings in this case and the court session will be adjourned until tomorrow morning

at 10 o'clock, and the jury will retire subject to the previous admonitions which have been previously given to the jury. You will remember and heed all those admonitions during the intermission of the Court until tomorrow morning at 10 o'clock. Be back promptly tomorrow morning at 10 o'clock. You may now retire.

(Whereupon, at 4:35 o'clock p.m., the hearing was adjourned until 10 o'clock a.m., May 21, 1947.)

May 21, 1947, 10 o'Clock A.M.

Court convened pursuant to adjournment; present as before.

The Court: May the record show that a call of the jury is waived, that all the jurors are present and also all parties on trial with their counsel. Does the plaintiff so agree?

Mr. Pomeroy: The government agrees.

The Court: Does the defendant?

Mr. Beardslee: Yes, your Honor.

The Court: Let the record show that. You may proceed with the trial.

Mr. Pomeroy: I will offer Exhibits 1 and 2.

Mr. Beardslee: At this time, if your Honor please, I had a matter I would like to take up with the Court.

The Court: The jury will temporarily retire to the jury room.

(Jury retires.)

The Court: You may proceed, Mr. Beardslee.

(Discussion concerning taking of defendant's picture for the newspaper; no ruling.)

The Court: Does anyone wish to make any statement about these offered exhibits, Plaintiff's Exhibits 1 and 2?

Mr. Beardslee: I object to them, if your Honor please, because there is no connection at all between those exhibits and this defendant. In fact, the government, in my opinion, has proven the defendant in this case had no connection whatsoever with the narcotics that are pictured in that photograph. It hasn't been properly connected up, if your Honor please.

The Court: Does the plaintiff wish the Court to have the benefit of any authorities upon the plaintiff's right to have these documents admitted in evidence?

Mr. Pomeroy: Yes, your Honor. Do you wish me to answer the point I brought up?

Mr. Beardslee: You understand I am not objecting to the competency because they are pictures taken of it. I am objecting to the materiality, which could result in prejudice.

The Court: Are you objecting to the exhibits on the ground that they are photographs of the real matter claimed by the government to be material instead of being the material itself, the contraband itself?

Mr. Beardslee: No, your Honor, I am not offering that objection. It is merely that there is no

more relationship, if the actual opium had been brought, I mean, I would offer the same objection. There is no more relevancy than if somebody brought in a case of whiskey in some other case. It hasn't been properly tied up, hasn't been shown it is material to this case and it certainly could be very prejudicial.

The Court: Then the Court will not take up your time in asking you to comment upon the admission of the photographs. That question you need not deal with. But the other thing, suppose instead of photographs you had the contraband itself here?

Mr. Pomeroy: Yes, your Honor.

The Court: Address your remarks to the admissibility of that.

(Argument by Mr. Pomeroy and Mr. Beardslee.)

The Court: The Court is of the opinion that under the facts and conditions proven in this case touching the admissibility of the contraband itself against this defendant it shows it is admissible, and the Court is of the opinion that these photographs of the contraband are admissible in evidence in view of the fact that there isn't any objection to the exhibits as photographs; and that the only objection that there is made to this exhibit is the same one which would be made and could be made against the contraband itself were it here in the place of these exhibits. And I think that there is a reason for supporting admissibility of these photographs

of the contraband in this case because it has been testified that in the ordinary course of government business the contraband itself had, after these photographs were taken, been destroyed and is not itself available.

Mr. Beardslee: Been destroyed, as I understand it, because they considered the case is closed.

The Court: Well, it has been destroyed in the ordinary course of the government's business, and in the usual manner as I understand from the testimony, of disposal of such property. And after the jury is brought in the Court intends to rule admitting these two exhibits in evidence. Mr. Beardslee?

Mr. Beardslee: I have nothing further to say except the record should show that this argument has taken place in the absence of the jury, and I would like to preserve an exception to your Honor's ruling.

The Court: You may do that. Bring in the jury.

(Whereupon the jury returned to the jury box.)

The Court: All of the jurors have returned to their places as before. Plaintiff's Exhibits 1 and 2 and each of them are now admitted in evidence, and defendant excepts and his exception is allowed.

(Plaintiff's Exhibits 1 and 2, photographs, were received in evidence.)

(There followed next the testimony of Hugh Olivey, previously transcribed.)

HUGH OLIVEY

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pomery:

Q. Please state your name to the Court.

A. Hugh Olivey.

Q. How do you spell the last name?

A. O-l-i-v-e-y.

Q. Mr. Olivey, do you know the defendant,
Robert De La Lama? A. Yes.

Q. Where did you first meet him?

A. In Phoenix.

Q. About when was that?

A. In June of last year.

Q. Mr. Olivey, how long were you in Phoenix
on that occasion? A. About four days.

Q. And where did you live when you were in
Phoenix? A. At the Palomine Auto Court.

Q. Were you alone or with someone?

A. I was with Mr. Van Treel.

Q. And Mr. Van Treel, what was his occupation
at that time?

A. He was a federal narcotics agent.

Q. And what was your occupation at that time?

A. I was a special employee, narcotics.

Q. And where is Mr. Van Treel now?

A. He died a week ago Sunday.

Q. He died a week ago Sunday. Now Mr. Olivey,
during the four days that you were in Phoenix how
often did you see Mr. De La Lama?

A. About every night.

(Testimony of Hugh Olivey.)

Q. And where did you see him?

A. I met him at the El Paso Bar.

Mr. Beardslee: I will submit, if your Honor please, that that would have no bearing whatsoever upon this case. This is tried in this jurisdiction and the offense alleged to be in this jurisdiction. Where he saw Mr. De La Lama each and every day wouldn't have any bearing whatsoever on this case, in Phoenix. There is no charge in the indictment.

Mr. Pomeroy: Will you read the last question and and answer, please?

(Last question read by the reporter.)

The Court: What year and what time? That is what the Court would like to know so as to know what the inquiry is about.

Mr. Pomeroy: My recollection is that he testified it was in June, last year.

The Court: That may be, but these questions don't show that.

Q. Will you state again, Mr. Olivey, when this occurred? When you were in Phoenix and when you saw Mr. De La Lama?

A. I was in Phoenix from the 25th to the 30th of June, 1946.

The Court: Before you proceed further, in view of the objection the Court would ilke to know from plaintiff's counsel what theory of admissibility he elaims in this connection.

Mr. Pomeroy: Conversations and admissions taking place by the defendant.

(Testimony of Hugh Olivey.)

The Court: You haven't said so, but I assume concerning some fact at issue in this case?

Mr. Pomeroy: Concerning this particular case, admissions concerning this particular case.

Mr. Beardslee: I think at this time, your Honor please, he might show the time and place where conversations occurred pertaining to this offense, but——

The Court: And who was present.

Mr. Beardslee: Yes.

Mr. Pomeroy: I haven't started to ask about a conversation yet. I am merely laying a foundation.

Mr. Beardslee: He asked where he had seen him, and in counsel's opening statement he referred to a conversation that would be material to this case. And counsel referred to the date and place where it occurred, and it was one conversation. Now this witness may have seen him at a bull fight or may have seen him in church or may have seen him in places that could tend to be prejudicial. I don't know. But if it has no bearing on the case I think counsel should be instructed to get down to the meat of the coconut and find out when and where any conversation took place pertaining to this case.

The Court: All of these objections are overruled upon this condition: That counsel for the plaintiff must ask the witness to relate the circumstances, the time and place and persons present when the alleged statement was made before he asks the witness what the statement was.

Mr. Pomeroy: I haven't asked that yet. I think this is all anticipation by counsel.

(Testimony of Hugh Olivey.)

The Court: You may proceed under the conditions stated by the Court.

Q. (By Mr. Pomeroy): You state that the first place you saw him was in the El Paso Bar, is that correct? A. Yes, sir.

Q. How and under what circumstances did you first see him there?

A. The bartender, Ernest Collins, introduced Mr. Van Treel and I to De La Lama.

Q. And did you have a conversation, you and Mr. Van Treel, have a conversation with Mr. De La Lama on that occasion? A. Yes.

Q. And who was present at that conversation?

A. Mr. Van Treel and myself and Mr. De La Lama.

Q. State what that conversation was?

A. Well, Mr. Van Treel told Mr. De La Lama that he thought that on this trip up north when De La Lama and Vasquez had been picked up here in Seattle, that he had brought kind of a poor partner, that Vasquez had been very careless in carrying people's addresses in his pocket, addresses of different users that were known in the Northwest. And that after Vasquez was arrested that several of these people had been picked up and questioned.

After Mr. Van Treel had said this, why Mr. De La Lama got kind of mad and said that he didn't think that Vasquez was responsible for that, and that he personally trusted Vasquez, and that when they were arrested here in Seattle that the opium that was found in the back of Vasquez's car had belonged to him personally.

The Court: Whom? Whom?

(Testimony of Hugh Olivey.)

A. To Mr. De La Lama. That Vasquez had claimed ownership of it because it was in his car.

The Court: Whose car? "His". Whose car?

A. Vasquez' car, and that Vasquez would be held responsible for the transportation of it anyhow. So he went ahead and claimed the ownership as well. So in that way Mr. De La Lama felt that he was indebted to Vasquez and said at the time that he intended to try to repay Vasquez if possible, to send him some money to repay this favor.

And he went on further to state that Vasquez was leaving that evening for Seattle and that he was going to give Vasquez some narcotics to use on the trip up here, and also to hold him while he was going to trial.

After Mr. De La Lama left, Mr. Van Treel and I went to the Western Union and sent a wire to Joe Belland.

Mr. Beardslee: Well, this is something not in the presence of the defendant, the wire that he sent. What they may have said would be strictly incompetent and hearsay.

The Court: What he did about the wire is not responsive to the question, anyway. The objection is sustained as to that at this point.

Q. (By Mr. Pomeroy): What further, if anything, did Mr. De La Lama say concerning the reason for his going north with Vasquez on that trip?

Mr. Beardslee: Now that, if your Honor please, is directly leading. The witness hasn't expressed

(Testimony of Hugh Olivey.)

any statement on that. Counsel now is implying that he did have such a conversation; putting words in this witness' mouth.

The Court: That objection is sustained.

Q. (By Mr. Pomeroy): Was there any further conversation concerning the northward trip of Vasquez by De La Lama on that occasion?

A. Yes. Mr. De La Lama—conversation was spread out over a period of about an hour, and during that time Mr. De La Lama said that he had came along so as to protect his money that he had invested in this load of opium that was to be sold through the Northwest.

Q. What name was Mr. Van Treel introduced to Mr. De La Lama by? A. As Jack Talbot.

Q. As Jack Talbot? A. Yes.

Q. And that was an assumed name, was it?

A. Yes.

Q. After this conversation where did you and Mr. Van Treel go?

A. We went to the Western Union office.

Mr. Beardslee: I object as immaterial where they went, if your Honor please. We are not interested after they were through with De La Lama.

The Court: The Court cannot at this moment tell whether or not it is material or not. Does the government promise to connect up its materiality with the charge against the defendant here?

Mr. Pomeroy: Well, it is not directly—it just goes on to corroborate what the witness already has testified to, that they went to this Western Union office, that is all, which was objected to before.

(Testimony of Hugh Olivey.)

The Court: That objection will be sustained.

Q. (By Mr. Pomeroy): Where else while you were in Phoenix did you see Mr. De La Lama?

A. At the Palomine Auto Court.

Q. And was that at the place where you and Mr. Van Treel were living while you were in Phoenix?

A. Yes.

Q. During the period that you were in Phoenix did you at any time observe Mr. De La Lama using narcotics?

A. Yes; at our cabin.

Mr. Beardslee: What was that answer?

A. Yes; at our cabin.

The Court: Did you understand it?

Mr. Beardslee: Yes, your Honor.

Q. And what type of narcotics did he use and how did he use them?

A. It was smoking opium, it was cooked up and rolled into a pill and eaten.

Q. Rolled into a pill and eaten?

A. Yes.

The Court: Mr. Olivey, will you keep your voice raised so all present can hear? Sometimes one's voice doesn't carry as well in the room as at other times. Keep your voice raised up so all can hear.

Q. (By Mr. Pomeroy): What was the purpose of you and Mr. Van Treel keeping up this association during this period of time with Mr. De La Lama in Phoenix?

Mr. Beardslee: Just a minute. Your Honor can readily see what that is leading to, the purpose of why they were keeping it up is bound to result in incompetent testimony of the——

(Testimony of Hugh Olivey.)

The Court: Mr. Reporter, will you read the question?

(Question read by the reporter.)

The Court: I will hear you now, Mr. Pomeroy, in response to the objection.

Mr. Pomeroy: Well, I am about to make an offer of proof.

• Mr. Beardslee: I suggest it be made in the regular way, your Honor. Counsel is familiar with the rules; offers of proof that will result in prejudice should be made to the Court.

The Court: You make a point it should be made in the absence of the jury?

Mr. Beardslee: Yes, your Honor.

The Court: The jury will temporarily retire.

(Jury leaves jury box.)

Mr. Pomeroy: My offer of proof, if the Court please, in this particular type of questioning is to the effect that they were there for four days attempting to get a shipment of opium from Mr. De La Lama, and they did succeed in buying several cans of opium from Mr. De La Lama and paying him a certain amount of money for it.

The Court: That, however, was a different transaction from that in this case, was it?

Mr. Pomeroy: That is correct.

The Court: Of course, he may have become a dope peddler or wholesaler in disconnected transactions at a later date than the transactions charged in this case. Is that not possible?

(Testimony of Hugh Olivey.)

Mr. Pomeroy: That is possible. However, I believe under our rules or our law that similar transactions made in the same period of time can be shown in our proof. And I believe——

The Court: Shown for what purpose, Mr. Pomeroy?

Mr. Pomeroy: Line of conduct.

The Court: Well, for the purpose of proving what, which is material in the case on trial? Would you like to look at those cases? I will give you a few minutes. It is probably of sufficient importance to you to justify you in looking at some expression of a court. Do you need a few minutes?

Mr. Pomeroy: Yes, I do.

The Court: You may have ten minutes. Court will be at recess for that time.

(Short recess.)

The Court: I will hear counsel now if you are ready, if the defendant is present with his counsel.

Mr. Pomeroy: If the Court please, I had time to look up one line of cases.

The Court: The question is whether or not subsequent transactions can be shown, as well as previous ones, on this question.

(Extensive argument and discussion.)

The Court: Now, any evidence that you offer to establish the defendant's purpose or interest is inadmissible insofar as it concerned that purpose one day, one month or two months or some other time after the commission of the crimes alleged in

(Testimony of Hugh Olivey.)

this case. But the purpose which the defendant had in mind in doing the acts alleged in the indictment is of interest and any evidence that reasonably reflects light upon that issue of the defendant's intent in doing the acts charged in the indictment might be admissible, if it isn't too remote.

Mr. Pomeroy: Well, the purpose of my offer of proof is to stay away from the question which your Honor I believe correctly rules is incorrect, and that is asking the witness what the purpose of his acts with De La Lama may have been at that time, and to elicit from the witness this information that he did while with De La Lama purchase from De La Lama certain narcotics and pay money for it.

The Court: To prove that he was customarily in the narcotics——

Mr. Pomeroy: The business of selling narcotics.

The Court: The narcotic business as bearing upon his intent to do the acts charged in the indictment?

Mr. Pomeroy: Yes, your Honor.

The Court: And that such other instances took place within the time here mentioned, which is two months or three months after the occurrence of the events charged in the indictment?

Mr. Pomeroy: Yes, your Honor.

The Court: The Court is of the opinion that it is reasonably near in time and that it has some bearing upon the question of the defendant's intent. As to how much I think it is proper for the jury

(Testimony of Hugh Olivey.)

to determine, and the Court is further of the opinion that the evidence last mentioned by Mr. Pomeroy is admissible for the purpose stated. That is, for the purpose of throwing light upon or tending to prove the intent of the defendant in connection with the acts charged in the indictment to have been offenses against the laws of the United States.

Mr. Beardslee: I should, your Honor, like to see any decision that holds what subsequent act three months after the alleged offense in this case occurred would be admissible.

The Court: The Court thinks it is reasonably probative and therefore expresses the opinion stated.

Is there anything further in the absence of the jury? Bring in the jury. But I wish to make it clear now while the jury is getting here, that we are not concerned with the purpose of the witness who is on the stand testifying. We are concerned only with the acts of the defendant and the statements of the defendant which concern his intent and purpose at the time he did the acts and in connection with his doing of the acts charged in this indictment, not at some later time.

Mr. Beardslee: Your Honor will allow me an exception?

The Court: Allowed.

(Jury returns to jury box.)

The Court: Let the record show the jurors have returned to their places in open court. You may proceed.

(Testimony of Hugh Olivey.)

Q. (By Mr. Pomeroy): Mr. Olivey, during the period of time you were in Phoenix and that you saw Mr. De La Lama, did you have any narcotics transactions with him?

A. Yes. Mr. Van Treel and I purchased four cans of opium from him.

Q. From whom?

A. From Mr. De La Lama.

Q. And how much did you pay him for the opium? A. Thirteen hundred dollars.

Q. And where did that occur?

A. At our cabin in the Palomine Auto Court in Phoenix.

The Court: When?

A. On the night of the 29th the opium was delivered to our cabin.

Mr. Beardsley: I would like to offer the further objection——

A. 29th of June.

Mr. Beardslee: If your Honor please, I desire to make a record at this time.

The Court: Will you wait at this moment until the witness has finished his statement as to the year, and then I will give you that opportunity.

A. It was on the 29th of June, 1946.

The Court: Now, Mr. Beardslee?

Mr. Beardslee: The further objection, it is incompetent because it is not the best evidence. He says he purchased four cans of opium. If he did I'd like to have him produce them right now. Otherwise, his testimony as to that is entirely incompetent and inadmissible.

(Testimony of Hugh Olivey.)

The Court: The objection is overruled. You may make a demand now upon him or later in connection with your cross-examination if you wish.

Mr. Beardslee: Exception, if your Honor please.

The Court: Allowed.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Beardslee:

Q. You said that you were a special employee of the government in June. What did you mean by that?

A. I was working with Mr. Van Treel.

Q. What type of work were you doing?

A. We were traveling around the country and meeting different dealers in narcotics.

Q. I see. And how long had you been engaged in that type of business?

A. Oh, during that spring.

Q. When did you first go to work for the government as a special employee, as you call it?

A. In January of 1946.

Q. And have you ever been convicted of a crime? A. Yes.

Q. And what was the nature of the crime of which you were convicted?

A. Sale of narcotics.

Q. Sale. You have been a dope peddler for years, haven't you? Haven't you?

A. I was convicted in 1939 in San Francisco.

Q. Yes. But you had been peddling dope to innocent people for many years prior to that time, had you not?

(Testimony of Hugh Olivey.)

Mr. Pomeroy: I will object to the form of the question.

The Court: Overruled.

Q. (By Mr. Beardslee): Isn't that true? Let the reporter the question to the witness so that you can make up your mind to answer.

(Preceding testimony read as follows:

“Q. You have been a dope peddler for years, haven't you? Haven't you?

“A. I was convicted in 1939 in San Francisco.

“Q. Yes. But you had been peddling dope to innocent people for many years prior to that time, had you not?”)

A. No.

Q. How many years prior to 1939 had you been a dope peddler?

A. Just during the fall of 1938.

Q. When were you finally caught at your occupation? A. In the 5th of January of 1939.

Q. I see. And you are not only a peddler, you were also a user, were you not? A. Yes sir.

Q. Just answer so that the court reporter can hear it. Don't nod your head.

A. Yes, sir.

Q. The answer was yes? A. Yes.

Q. How long have you been a narcotic addict?

A. Approximately 15 years.

(Testimony of Hugh Olivey.)

Q. I see. Have you ever tried to obtain a cure for it? A. Yes.

Q. When?

A. In 1939 I went to Fort Worth, Texas, for two years.

Q. Well, that was the result of your sentence?

A. Yes.

Q. Your penitentiary term that you received?

A. Yes.

Q. All right. And then when you were released you again became an addict, did you not? —

A. Yes.

Q. And have been a hop head—pardon me—have been a dope fiend ever since, haven't you?

A. Up until recently, yes. I am now in the hospital.

Q. Up until how recently?

A. I am now in the hospital, Swedish Hospital.

Q. Up until how recently, was the question.

A. This last summer, about three months ago I went to Crown Hill Sanitarium and took a cure.

Q. You testified about conversations and dealings that you had with Mr. De La Lama in June terminating, I believe, June 29 if I understood your answer correctly, of last year. Is that correct?

A. Yes.

Q. And you were a dope fiend then, were you not? A. Yes.

Q. And were using it right along?

A. Yes.

Q. And how did you acquire your dope? Government agents give it to you? A. No.

(Testimony of Hugh Olivey.)

Q. Did Van Treel give it to you? A. No.

Q. How did you get it?

A. I have been a tuberculosis patient for a number of years and——

Q. (Interrupting) I said, how did you get it?

A. From the doctor.

Q. From what doctors did you ever have a prescription for narcotics?

A. Oh, from several doctors. I have been in several sanitariums with t.b.

Q. You mean to tell me that the only narcotics that you have used in the past two or three years was prescribed to you by doctors?

A. No. I have had other drugs.

Q. What?

A. I have had other drugs, illicit drugs.

Q. Yes. And you were getting illicit drugs for your own use, were you not, in June of last year? Yes or no. A. No.

Q. You own a house of ill fame in Bellingham right now, don't you? A. No.

Q. Don't you have a woman operating a brothel for you in Bellingham today? A. No.

Q. How long since you have? Why don't you answer?

A. Well, I don't understand. I haven't had a hotel or anything.

Q. Did you know a Fred DeMoss?

A. No.

Q. Now in the county jail? A. No.

(Testimony of Hugh Olivey.)

Q. You never heard of such a party, is that right?

A. No. Never met——

Q. You have never sold dope to him?

A. I have never met anyone of that name to my knowledge.

Q. I see. Is that the only conviction you have had that you told me about, the one for being a dope peddler?

A. No. I was convicted of grand theft in San Francisco.

Q. When were you convicted of grand theft?

A. 1941.

Q. Uh-huh. That was shortly after you got out of the pen on your narcotic charge, was it not?

A. Yes sir.

Q. And will you please loosen up and tell me the other times that you have been convicted?

A. That is all my convictions.

Q. Haven't you ever been in as a vagrant?

A. Oh, I have been charged with vagrancy, yes.

Q. Often, haven't you?

A. Quite a number of times.

Q. Had to serve time for it, haven't you?

A. No.

Q. You have been run out of one town after another by various magistrates or courts, haven't you, because of being a vagrant?

A. No. I got a floater out of Salinas once, was all, on account of being tubercular.

Q. Tell the jury what you mean by a floater? We don't all understand the terms that you are familiar with.

(Testimony of Hugh Olivey.)

A. Well, I was given six months suspended sentence on condition that I leave the county because I had t. b.

Q. All right. Now that is three that we have got. Oh, you said on account of because you had t. b.?

A. That is what the magistrate specified.

Q. And what charge were you arrested and tried when you were given this so-called floater on a six months suspended sentence?

A. Vagrancy.

Q. I see. And the Court knew at that time that you were an addict?

A. No.

Q. That wasn't brought up at the trial?

A. I had no convictions at that time for——

Q. (Interrupting): You want us to understand that because you are suffering from t. b. the Court determined you were a vagrant and gave you a six months suspended sentence and told you to get out of town?

A. Yes.

Q. And that is the truth as you tell it?

A. That is what should be on the court record. That was what was in court.

Q. All right. Now how many other times have you been in jail for being a vagrant and not being wanted in any locality?

A. Well, I don't know. Quite a number of times.

Q. Twenty?

A. Not that many.

Q. Thirty? Fifteen?

A. About fifteen, I suppose.

(Testimony of Hugh Olivey.)

Q. Did Van Treel know that you were an addict when you were associating with him?

A. Yes.

Q. VanTreel using it too, was he?

A. No.

Q. You never saw him use it then?

A. No.

Q. How often did he provide the narcotics for you?

A. Mr. VanTreel never provided any narcotics for me.

Q. You said you purchased four jars of opium from the defendant in this case? A. Yes.

Q. Did you use it?

A. Just what he and I used in the cabin, and then they were given to Mr. VanTreel and he turned them over to Mr. Artiss, the supervisor for evidence.

Q. And you don't know where they are?

A. Beg pardon?

Q. You don't know where they are then?

A. They were turned over to the Federal Narcotics Office for evidence.

Q. Where? A. In Phoenix.

Q. How many other people did you contact in Phoenix, Arizona?

A. Mr. De La Lama and a fellow by the name of Cullins we met this same time.

Q. And anyone else?

A. That was all at that time.

The Court: You made a statement, "Just what he and I used", with reference to that purchase

(Testimony of Hugh Olivey.)

that you were speaking of that took place in Phoenix in your cabin. Who do you refer to by the pronoun "he", "Just what he and I used"?

A. Mr. De La Lama and I.

Q. I don't suppose you know Roy Linville, do you?

A. Yes.

Q. Oh, then you contacted him, also?

A. Not at this time, no.

Q. Contact Linville in Phoenix?

A. Not in June, no.

Q. When did you contact him?

A. In January.

Q. I see. Oh, by the way, you tried to induce De La Lama to smoke a pill that you offered him, didn't you?

A. Not that I remember.

Q. Isn't it true that in June you contacted De La Lama and after conversing with him on several different occasions you told him all about the glories of narcotics, what they would do for you, they would lift you into the clouds and all, didn't you?

A. No.

Q. All right. You say "Not that I remember." Isn't it true that you rolled a pill and offered it to him?

A. Mr. De La Lama and I both rolled pills.

Q. Just a minute. Will you answer my question? Isn't it true that you rolled a pill and offered it to him?

A. I don't remember that, no.

Q. Isn't that the first time you ever dared to suggest to Mr. De La Lama that he should start using opium?

(Testimony of Hugh Olivey.)

A. No. I don't remember suggesting such a thing. He had just delivered the four cans to us to the cabin, and we had opened them.

Q. All right. Didn't you offer him a pill and didn't he take it into the kitchen and dispose of it?

A. I don't know.

Q. By the way, with your experience you know what happens to a man when he is arrested and held in confinement that is a confirmed user of narcotics, do you not?

A. Yes.

Q. He gets awfully sick, doesn't he?

A. Yes.

Q. And so sick that he virtually becomes unconscious, in some instances does; is that true?

A. No. I never seen them that sick.

Q. You have seen them so sick that they cry for narcotics, haven't you?

A. No, I never have.

Q. You have been that sick, haven't you?

A. No, never have.

Q. Isn't that why you became a stool pigeon, so you could get more narcotics?

Mr. Pomeroy: Object to the form of the question.

The Court: Overruled.

Mr. Pomeroy: The use of the word "stool pigeon".

The Court: The ruling will stand.

A. No.

Q. All right. How much and in what form of narcotics were you using in June of 1946?

A. I was using 2 grains of morphine hypodermically, a day.

(Testimony of Hugh Olivey.)

Q. And was that the only type you were using?

A. Yes.

Q. You didn't use any other type of narcotic at all?

A. When Mr. De La Lama brought the cans of opium to the cabin we each took some of the opium and rolled it up and ate it.

Q. How often did you do that?

A. Well, we was there I believe for one day after the opium was delivered.

Q. And how much of it did you smoke?

A. We didn't smoke any of it.

Q. What did you do with it?

A. We just rolled it into a pill and swallowed it with a glass of water. What they call a——

The Court: Just a minute. I think the witness' voice has gotten so the reporter can't hear it and if that is true I don't see how anyone else can be expected to hear it. The Court directs you, keep your voice raised clear and distinct. When an objection is made by counsel wait until counsel's statement is finished before you make your statement so that there will be no conflict of voices.

Now will you read that question?

(Last question and answer read by the reporter.)

The Court: What they call a——?

A. Yen pock.

The Court: Y-e-n?

A. P-o-k.

The Court: P-o-k. Two different words?

A. I believe so, y-e-n, p-o-k.

(Testimony of Hugh Olivey.)

Q. (By Mr. Beardslee): How long have you been swallowing these opium pills?

A. Well, just during the day that these cans were at the cabin and while Mr. De La Lama was there, why I took it.

Q. Pardon me. Finish. You never swallowed opium pills at any other time, is that right?

A. Oh, I did previously, yes.

Q. Yes. All I am trying to get at is the truth. How often had you swallowed them previously?

A. Well, I used to take a couple of them a day for a period of years before I went to the pen.

Q. And that was during the time that you were peddling? A. Yes.

Q. And you were using hypodermic injections of morphine at the same time, were you?

A. No. I was using the hypodermic injections of morphine in June of 1946.

Q. I understand that you started traveling with VanTreel in about January of 1946?

A. Yes.

Q. And you traveled with him for what period of time? A. Until November of 1946.

Q. And during all that period of time he didn't provide you with any narcotics, is that true?

A. No.

Q. But he would permit you to use whatever you were able to buy?

A. Whatever was prescribed by the physician.

Q. Well, was this pill that you say you swallowed, of De La Lama's, prescribed by any physician? A. No.

(Testimony of Hugh Olivey.)

Q. Well, all right. I want to know how many illicit pills you were swallowing, or how much morphine injections you were illicitly taking during that period of time?

A. I don't understand the question.

Q. How many—during the period of time that you were traveling with VanTreel how many illegal pills of opium did you swallow?

A. I imagine De La Lama and I took about four pills apiece there in the cabin.

Q. Didn't you tell me awhile ago it was one each?

A. I don't remember specifying any exact number before. I can't say that four is the exact number.

Q. I see. Is that all, the pills that you took with Mr. De La Lama, that you swallowed during the period of time that you were travelling with Mr. VanTreel?

A. That was all I took out of those four cans that we purchased from Mr. De La Lama.

The Court: I think counsel wants to know if in addition to that source you got any other narcotics and used any other narcotics while you were in company with or assisting Mr. VanTreel?

Mr. Pomeroy: In Phoenix or otherwise, any cities that you were in.

A. Just what has been prescribed by my physician.

Q. (By Mr. Beardslee): And that is all, then, is that true? A. Yes.

(Testimony of Hugh Olivey.)

Q. Did you make purchases of opium during the period of time you were traveling with Van Treel other than the purchase that you say you made from this defendant? A. Yes.

Q. And on how many different occasions did you make purchases of opium?

A. Twice apart from De La Lama's.

Q. I see. And didn't you swallow any of that?

A. No. It was delivered in a different manner.

Q. I see. So you didn't—this is the only time that you ever swallowed pills outside of the period prior to going to the pen in 1939, is that right?

A. Yes, while I was traveling with Mr. Van Treel, yes.

Q. Getting back to what I was inquiring about before, that is the reaction that an addict has when he is placed in confinement where he can't obtain it, it is true that you suffer hallucinations, is it not?

A. No, I never seen anyone go out of their head.

Q. They become nauseated?

A. Yes, become sick to their stomach, as a rule.

Q. So that it is impossible for anyone that is an addict to go to jail and be cut off from a supply without getting sick to such an extent that the jailers or jail attaches would realize their condition right away? That is true, isn't it?

A. Well, it depends on how much of a habit the person has.

(Testimony of Hugh Olivey.)

Q. Well, how about swallowing four pills in one day. That is quite a violent habit, isn't it?

A. Oh, if you kept it up over a period of years it would be.

Q. The reason I am asking these questions, Mr. Olivey, I think it is well known that De La Lama has been in jail ever since he was arrested and it might be possible to have the jailer in attendance present. And I now want to warn you as to the seriousness of perjury in this or any other court.

In view of what I have just advised you do you say again that Mr. De Lama was an addict?

A. What I saw him take there in the cabin I don't know, or rather I wasn't with him on other days. I don't know if he kept that up steadily or not.

Q. Why, you addicts always get together, do you not, and know each other?

A. I had never known Mr. De La Lama until I met him there in Phoenix.

Q. Wherever you had gone to a strange town you became acquainted with addicts, didn't you? You know their habits and their customs? That is true?

A. Yes, to a certain extent.

Q. And you spent four days with De La Lama?

A. Yes.

Q. And during that period of time the only time you knew or thought that he might be an addict was because of the four pills you say that he consumed with you, is that right? Or do you want to change that story?

(Testimony of Hugh Olivey.)

A. I don't remember stating definitely that Mr. De La Lama was an addict. I don't know. I just say what I saw him take in the cabin.

Q. Well, thinking back again, do you remember trying to persuade him to become an addict?

A. No, I wasn't around Mr. De La Lama to that extent.

Q. You don't recall whether you had offered him a pill or not? Do you recall now whether you did?

A. No, I don't recall offering him anything.

Q. That was your business, wasn't it, to try to make addicts out of people?

A. In this case we had purchased the narcotics——

Q. I say, that was your purpose in traveling with Van Treel, wasn't it, to try to make addicts out of people?

A. No. It was to purchase narcotics from peddlers.

Q. I see. Isn't it true that you went outside and procured a hypodermic needle and a jar of hop of some kind, or morphine, brought it in to De La Lama and tried to persuade him to inject it in his arm?

A. No, I don't remember that.

Q. You were carrying a hypodermic needle with you all the time, weren't you?

A. Yes.

Q. And you were using it?

A. Yes.

Q. You say you don't remember doing that? Would you say that is not true?

A. I don't believe it is true, no.

(Testimony of Hugh Olivey.)

Q. But you would not deny but what you did that very thing, would you?

A. In a case like that in undercover work——

Q. (Interrupting): I asked you a question, please. May I have an answer?

Mr. Pomeroy: I will object to the form of the question as being argumentative.

The Court: The objection is overruled and the objection to the witness' answer is overruled. You may proceed with your answer.

A. I would like to hear the question again now.

The Court: Keep your mind on the question and do not be confused by objections made by counsel nor rulings or statements made by the Court.

(Question read.)

A. Yes, I would deny doing that.

Q. (By Mr. Beardslee): I see. Then if I understand your answer correctly, you want us to believe that you definitely did not take in a hypodermic needle and ask the defendant, Mr. De La Lama in this case, to use it?

A. I may have brought in the hypodermic needle and said that he could use it if he wished.

Q. But you wouldn't talk him into it, would you?

A. No. He was the one who had delivered the narcotics. He was showing it to us. We weren't showing it to him.

Q. I will ask you this question: If Mr. De La Lama used the hypodermic needle, used dope in that form, there would be scars on his arm, wouldn't there, or under his arm?

(Testimony of Hugh Olivey.)

A. I don't recall Mr. De La Lama taking any hypodermic.

Q. Well, that didn't answer the question. Your arms are full of scars, are they not? A. Yes.

Q. And they never leave, do they? A. No.

Q. Consequently the doctor could tell in a couple of minutes by examining Mr. De La Lama whether he had ever used any, couldn't he?

A. If he had used it hypodermically.

Q. I mean it would show on his arm whether he had ever had any hypodermic needle for the purpose of administering dope used on it?

A. Yes.

Q. How old are you, sir?

A. Thirty-eight.

Q. Thirty-eight? A. Yes.

Q. You were not in the service in the last war, I take it? A. No.

Q. What schooling or education have you had? What academic training?

A. High school education.

Q. And that was where?

A. In Vancouver, Canada.

Q. Are you an American citizen?

A. Beg pardon?

Q. Are you an American citizen?

A. Yes.

Q. Born here? A. In New York.

Q. Lived in Canada how long?

A. About twenty years.

(Testimony of Hugh Olivey.)

Q. I see. That was during your younger years of life? A. Yes.

Q. Were you using narcotics while you were in high school? A. No.

Q. How long after you came out did you commence using them?

A. Oh, it was quite a number of years after I left school.

Q. How many times have you testified in court?

A. This is the first time.

Q. Didn't you testify in any of your own cases?

A. No.

Q. How did the Court that gave you the floater know you had t. b. unless you told him?

A. I was taken into the county jail and I had a hemorrhage there and they transferred me up to the t. b. hospital.

Q. You have never taken the witness stand then in your own defense at any time, is that right?

A. No.

Q. And you have never testified in any other narcotics case? A. No.

Q. After you made this alleged purchase in Phoenix, Arizona, of the four jars you say it was turned over to the narcotics agents in Phoenix?

A. Yes.

Q. And was a charge filed there against Mr. De La Lama?

Mr. Pomeroy: I will object to that as not being the best evidence.

The Court: Overruled. If he knows.

(Testimony of Hugh Olivey.)

A. I don't know what became of that case.

Q. You are telling me the truth in that? You have no knowledge of that at all, is that true?

A. No personal knowledge of that. The only thing, I read an article in the newspaper.

Mr. Beardslee: Let the court reporter read that last answer.

(Last answer read by the reporter.)

Q. Do you know when Mr. De La Lama was arrested in this case? A. No, I don't.

Q. You never heard of any conviction against Mr. De La Lama, have you?

Mr. Pomeroy: I will object to that as not being a proper way to prove it.

The Court: Overruled.

Q. Have you? A. No.

Mr. Beardslee: That is all.

Redirect Examination

By Mr. Pomeroy:

Q. Where did you travel with Mr. VanTreel, during—what parts of the country during this eleven months you were with him?

A. From Phoenix to Canada, back and forth several times.

Q. Go into Mexico with him? A. Yes.

Q. Were you over in California?

A. Yes.

Q. In Oregon? A. Yes.

Q. State of Washington? A. Yes.

Q. British Columbia? A. Yes.

(Testimony of Hugh Olivey.)

Q. Where were the two purchases made that you say you made outside of the purchase from De La Lama? Where were those purchases made?

A. In California.

Q. Both of them? A. Yes.

Mr. Pomeroy: That is all.

Recross-Examination

By Mr. Beardslee:

Q. How many hours of the day, on an average, did you spend with VanTreed? [85]

A. We had a cabin and were together 24 hours a day.

Q. I see. Slept in the same bed and ate always together, were in each other's company 24 hours a day during all that period of time, is that true?

A. Yes.

Q. So then Mr. VanTreed then knew just how much dope you were taking, or did you try to do that on the side?

A. No, I had my prescription.

Mr. Beardslee: But not for the opium. That is all.

The Court: Step down. Call your next witness.

(Witness excused.)

Mr. Pomeroy: The government rests.

The Court: The plaintiff rests. The jury is excused until 1:45 and may now retire.

(Whereupon, at 11:50 a.m., the jury was excused.)

The Court: If there are any matters to be taken up in the absence of the jury, the Court requests you to do so now.

Mr. Beardslee: If your Honor please, first, in view of what this last witness has testified to, I'd like to have Lt. Belland instructed to return for the afternoon recess solely for the purpose of showing Mr. De La Lama's condition at the time of his arrest, as to whether he was a narcotics user or not.

Now if the lieutenant has some other business that is important, he can just send anyone up from down there, because I want to obtain——

The Court: The Lieutenant will kindly return at 1:45. He is excused until that time.

Mr. Beardslee: That is all I had in mind.

The Court: Any motions to be made at the close of the government's case?

Mr. Beardslee: Yes, your Honor.

The Court: The opportunity is given you now for that purpose.

Mr. Beardslee: Your Honor please, at this time the defendant challenges the sufficiency of the government's case and moves for a dismissal, and instructed verdict of not guilty.

Analyzing all of the testimony, the government has produced nothing whatsoever that tends to tie up the defendant with the possession of the opium as charged in this case. The last witness the government apparently relies on. He testified to an alleged offense over in Phoenix, Arizona. I think your Honor has probably read something about that,

there was a case pending against him there growing out of the transactions testified to by the last witness, and it has either been dismissed or is still pending. But anyway, that is a situation that will take care of itself.

Now all the government has been able to prove thus far is that De La Lama rode from Phoenix, Arizona, to Seattle in Vasquez's car. That part of that time he may have been driving the car. That in that car there were 13 jars of opium in the secret compartment. That opium was found on the person of Lucian Vasquez, none ever found on the person of this defendant.

That Vasquez, whom the government produced as a witness, testified in direct accordance with the story that he told at the time of his arrest by the city police and the federal narcotics agents. They brought him as a witness, it is part of their case, that De La Lama knew nothing of that opium, that he had no control over it, that he was coming out here to see his brother shortly after being discharged from the Army. At no time did he have any in his possession.

Sure, they can say "circumstantial evidence." But I contend the same thing would be true of me if some opium was found in the car of a train that I am riding in where it is concealed. There isn't any evidence even that he knew that Vasquez was an addict. But if he had known that there would be no reason for suspecting that he would be carrying opium in any such quantities as he had.

Vasquez told the story to the Seattle police that was verified by Lieutenant Belland. He also told a story here in court, as a government witness. That witness completely absolved De La Lama of any guilt in this charge.

The Court: The challenge is overruled and the motion denied.

Mr. Beardslee: Exception.

The Court: Allowed. Let's be prepared to proceed at 1:45.

Mr. Pomeroy: I gave an additional instruction to counsel and also to the Court this morning.

The Court: I have that. Court is recessed until 1:45 p.m.

(Whereupon, at 12 o'clock noon an adjournment was taken until 1:45 o'clock p.m.)

Mr. Beardslee: Lieutenant Belland, will you take the stand, please?

GILBERT L. BELLAND

called as a witness on behalf of Defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Beardslee:

Q. You have been introduced to the jury before, Lieutenant Belland, so I don't need to go through the formalities. You were present and participated

(Testimony of Gilbert L. Belland.)

in the arrest of Lucian Vasquez and Robert M. De La Lama, the defendant in this case, on March 23, were you not? A. Yes, sir.

Q. And you have had occasion to interview both the defendant and Vasquez for several days, have you not—two or three days, anyway? A. Yes.

Q. Did Vasquez become sick and ill while in the jail through lack of narcotics?

A. Vasquez did become sick.

Q. Was it obvious to you and everyone else concerned that he was ill by reason of the fact that he was at that time using narcotics?

A. His appearance to me indicated that he was suffering from the withdrawal symptoms of addiction.

Q. By withdrawal symptoms, that is being deprived of narcotics?

A. He wasn't getting what he apparently had been used to taking.

Q. You are in charge, are you not, of the narcotics division of the Seattle Police Department?

A. That is correct.

Q. And you have been in that detail or division, whatever you call it, for a matter of years, haven't you? A. That is right.

Q. During those years you have had occasion to observe addicts? A. Yes, sir.

Q. And you can invariably spot the symptoms of an addict or narcotic user, isn't that true?

A. If they have a very mild habit it would be questionable whether even a physician could detect

(Testimony of Gilbert L. Belland.)

that. But where they do have a habit of considerable proportions it is obviously noticeable.

Q. A man swallowing four opium pills in one day, you wouldn't have any difficulty at all, would you?

A. I doubt that.

Q. State whether you observed any symptoms whatsoever that the defendant, Mr. De La Lama, has ever used narcotics in any form.

A. It was—Vasquez and he both seemed tired and sort of drowsy-like, but he didn't make any request for narcotics and it was my honest opinion that he was not a user of narcotics. However, that is something that I couldn't be positive of because he could take a small amount in the stomach habit and still he wouldn't show it.

Q. There were no physical symptoms of his having ever used narcotics?

A. To me it didn't register that he was a user.

Q. It was your opinion definitely that he was not?

A. That he was not.

Cross-Examination

By Mr. Pomeroy:

Q. Lieutenant Belland, in the vernacular of your work as a narcotics law-enforcement officer, do you use a term "a pleasure smoker?"

A. That is right.

Q. What does that term mean? What is a pleasure smoker?

A. Well, a pleasure smoker is applicable to people that I know of my own knowledge, that they do

(Testimony of Gilbert L. Belland.)

smoke occasionally. They will get together maybe once a week, maybe every three weeks or a month or maybe a longer period. But whenever they have an opportunity and as they call it, cheat and get a chance to smoke, they will smoke. I have seen those people be confined and they haven't shown any withdrawal symptoms.

Q. In other words, they are not confirmed addicts, is that correct? A. That is correct.

Q. They merely partake of it once in a while?

A. That is right.

Mr. Pomeroy: That is all.

Redirect Examination

By Mr. Beardslee:

Q. You in your answer to counsel's question said that when they had an opportunity they would get together and smoke. You meant that to be true, did you not?

A. Well, that has been my opinion, that when they can and have it, the situation is suitable, those people will smoke.

Q. If a so-called pleasure smoker, though, had a constant opportunity, in other words if he was a dealer in narcotics, he would be using it all the time, would he not?

A. I rather think that he would have used it.

Mr. Beardslee: That is all.

The Court: You may be excused from the stand.

(Witness excused.)

JAMES M. SCHWERDFIELD

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Beardslee:

Q. State your name, please?

A. James M. Schwerdfeld.

Q. Spell it, please.

A. S-c-h-w-e-r-d-f-i-e-l-d.

Q. And you are a deputy U. S. Marshal?

A. That is right.

Q. Were you present with me when under authorization of the Court I attempted to interview Lucian Vasquez at about five or ten minutes after 12 yesterday? A. I was.

Q. And prior to going down to be interviewed, did you stop to invite along also a Federal narcotics agent and found that he was out?

A. That is correct.

Q. Would Vasquez talk to me at all?

A. He would not.

Mr. Beardslee: That is all.

Mr. Pomeroy: No questions.

The Court: Step down.

(Witness excused.)

ROBERT M. DE LA LAMA

the defendant, called as a witness in his own behalf,
first duly sworn, testified as follows:

Direct Examination

By Mr. Beardslee:

Q. Your name is Robert M. De La Lama?

A. Yes.

Q. And you are the defendant in this case?

A. Yes.

Q. How old are you? A. Thirty-four.

Q. I am going to have to ask you to speak a little
bit louder. A. Thirty-four.

Q. And where do you reside?

A. Phoenix, Arizona.

Q. How long have you lived there?

A. Born and raised there.

Q. What has been your occupation in the past
three or four years?

A. Salesman, and I have been in the Army.

Q. How long were you in the Army and when?

A. Twenty-nine months.

Q. And when were you discharged from the
Army. A. October the 11th, 1945.

Q. Honorable discharge or otherwise?

A. Yes, sir.

Q. Where did you serve while in the Army?

A. England, France, Germany, Belgium, and
Holland; Czechoslovakia.

Q. Were you wounded during that period of
service? A. I was.

Q. Receive a Purple Heart? A. I did.

(Testimony of Robert M. De La Lama.)

Q. In addition to that did you receive two citations for bravery in action? A. I did.

Q. Where is your discharge now?

A. I have a photostatic copy of it in the county jail.

Q. Down in the jail? A. Yes.

Q. Were you arrested in Seattle approximately March 23, 1945? A. I was.

Q. With Lucian Vasquez at the same time?

A. Yes.

Q. At the time of your arrest were you confined in jail? A. I was.

Q. And how long did you remain in jail?

A. I don't exactly remember. It was three or four days. I think, or four or five days. I don't remember how long it was.

Q. While you were in there were you interviewed by police officers and also federal officers?

A. I was.

Q. Did they thoroughly go into your history?

A. I think they did.

Q. You were asked many questions, where you came from, where you had lived and what your connections were? A. Yes.

Q. Was a charge filed against you on that occasion, or were you released?

A. I was released.

Q. And upon your dismissal what did you do?

A. Well, I went home.

Q. There has been some inferences that you paid me an attorney fee for Vasquez. Did you?

A. I did not.

(Testimony of Robert M. De La Lama.)

Q. Prior to your coming over to Seattle on this trip how many times had you seen me?

A. I didn't get the question.

Q. Did you ever see me more than one time prior to your charge in this case?

A. In this case here?

Q. Yes. A. Yes, I did.

Q. I mean before you were brought over from Arizona on this charge on which you are standing trial, had you ever seen me more than one time?

A. I saw you in the county jail.

Q. Was it county or city?

A. Oh, you are talking about the——

Q. I am talking about your arrest on March 23, 1946.

A. Oh, in the city jail I think I saw you once there.

Q. Did you ever see me after that until you were brought over on this charge?

A. No, I didn't.

The Court: Give him about the approximate date.

Q. When were you brought over to Seattle on this charge?

The Court: The last time.

A. I have been here about two weeks.

Q. About how long?

A. Been in jail about two weeks there.

Q. Well, prior to your being brought over, this two-week period you have been in jail here in Seattle, had you ever seen me but once before in your life?

A. Just one time.

(Testimony of Robert M. De La Lama.)

Q. Did you pay me anything on that occasion?

A. No, I didn't.

Q. There has been some testimony that you transferred or handed Lucian Vasquez \$500 at the time of your release from jail. Is that true or untrue?

A. That is true.

Q. Did Lucian Vasquez have any money with him at that time?

A. I imagine he did.

Q. You didn't answer loud enough. I think your answer was, "I imagine he did." I can half-way read your lips but the court reporter's head is turned the other way. You will have to speak a little bit more loudly.

The Court: You see, every person in the jury box wants to hear and is entitled to hear every word you speak. And if you speak words which they do not hear, why then your speaking them will not do you any good or anyone else. So you ought to have that in mind, that when you are asked to speak a word you ought to speak it so that everyone here who is supposed to hear it can do so. You have an interest in your own behalf to do that.

Q. There has been some testimony that Vasquez had about fourteen or fifteen hundred dollars on him. Is that true or not, do you know?

A. I don't know.

Q. All right. Where did you obtain the \$500 or whatever amount it was that you authorized to be transferred over to Lucian Vasquez?

A. It was money belonging to him.

(Testimony of Robert M. De La Lama.)

Q. Have you ever been a user of narcotics at any time? A. Never.

Q. In any way, shape, manner or form?

A. Never have used it.

Q. Again I am going to ask you to speak a little louder. Would you be willing to submit to a doctor's examination at any time in an effort to determine whether you have or not? A. Yes, I am.

Q. Have you ever engaged in the traffic of narcotics? A. No, I haven't.

Q. Have you ever at any time in your life sold or offered to sell any narcotics? A. Never have.

Q. Have you ever at any time had, knowingly had, in your possession, narcotics?

A. Never have.

Q. What if anything do you know about the opium that was found on the person of Lucian Vasquez and the opium that was later found in the secret compartment of his car?

A. The first I knew of that opium was when he was searched and there was a can found in his pocket, or a jar. That is the first I knew of the opium. The 13 jars they are talking about, I never saw them.

Mr. Beardslee: Can the jury hear his answers?

The Court: Did you hear him fairly well?

Mr. Beardslee: What was it you said you knew about or did not know about?

A. The first I knew of him having any narcotics was when he was searched and there was a jar found wrapped up in a piece of paper.

(Testimony of Robert M. De La Loma.)

Q. What was the occasion of your coming over to Seattle on or about March 23?

A. Well, I have a brother in Tacoma and I thought I would come over to see him, so Vasquez asked me if I wanted to ride with him because I told him about a brother being in Tacoma. And he told me he was coming that way and if I wanted to ride with him I could help him drive. My brother was working in some shipyard there or something, in Tacoma.

Q. Did you have any purpose in making the trip other than to see your brother?

A. Just to see my brother.

Q. Do you have any other brothers or sisters in the family? A. Yes, I have.

Q. Just before the noon recess a witness testified that you swallowed some opium pills with him. Is that true or untrue? A. It is not true.

Q. Did you know the witness that testified?

A. No, I don't know him. I meet him in Phoenix.

Q. I see. Did he at any time ever attempt to induce you to use narcotics? A. He did.

Q. And in what form?

A. At first he started talking about narcotics there in the cabin there, and then——

Q. (Interrupting): You are going to have to talk louder because even watching you now I have difficulty hearing you.

A. At first he started talking about narcotics there in his cabin. And then he says, "Well, wait

(Testimony of Robert M. De La Lama.)

a minute," he says and he went outside and brought a package like that from the outside. And he had one of them needles, what you call them?

Q. Hypodermic needles?

A. Hypodermic needle, and some jars there, and a little bottle like that of liquid fluid. And he wanted me to take a shot of it. I told him I didn't care for it, so then he got some opium out of a jar and stuck a needle in it and rolled up a pill and give it to me. And I went in the kitchen of the cabin there and turned the water on, mashed the pill and put it in the sink. And I told him I had swallowed it. But I actually threw it away. Just one is all he gave me.

Q. Under what circumstances did you meet him and where?

A. I met him at the El Paso Buffet.

The Court: El Paso Buffet is what he said.

Q. Is that a bar? A. That is a bar.

Q. Had you been drinking at the time, or not?

A. No. I come in there and the bartender introduced us.

Q. Did he tell you who he was. Olivey?

A. No.

Q. Or what he was doing?

A. No, he didn't.

Q. Did he make any effort to pursue you around Phoenix, renew acquaintance?

A. Yes, he did.

Q. Had you ever seen him before that time?

A. No, I hadn't.

(Testimony of Robert M. De La Lama.)

Q. Have you ever seen him since that time?

A. Never have.

Q. When did you first learn that he was a user of narcotics?

A. Not until today. I mean, he used them in Phoenix down there but I didn't know he was an addict, no.

Mr. Beardslee: You may cross-examine.

Cross-Examination

By Mr. Pomeroy:

Q. How much money did Vasquez give you that you had of his on your trip to Seattle?

A. Five hundred I remember.

Q. How much money did you have altogether?

A. I had about nine hundred.

Q. Why did Vasquez give you \$500 of his to carry for him?

A. Just give it to me to carry for him. He said it was——

Q. He said what?

A. He give it to me in the car when we was going up to the police station. He told me he was probably going to stay in jail, and to try and make bond for him.

Q. And then you gave him the five hundred back?

A. When I couldn't do no good.

Q. And four hundred of that was your own money?

A. That is right.

Q. By what means did you travel back to Phoenix after you were released?

A. Train.

(Testimony of Robert M. De La Lama.)

Q. And how soon after you were released did you go back to Phoenix? A. That same day.

Q. After you were released you went back the same day? A. Correct.

Q. How many days had you been in Seattle prior to the time you were first arrested?

A. I think we slept here one night.

Q. And you were arrested the next day? .

A. The next day.

Q. What occupation have you had since you were discharged from the Army?

A. I haven't had much occupation. I never worked because I got an injury in the back.

Q. I can't hear you.

A. I had an injury in the Army, in my back.

Q. And you didn't work then from October until the present time, is that right?

A. That is right.

Q. What was your occupation before you entered the Army? A. Salesman.

Q. What kind of salesman?

A. Automobile and furs.

Q. Automobiles and furs?

A. That is right.

Q. And how long were you a fur salesman?

A. Oh, about a year.

Q. Was that just prior to your going in the Army?

A. Well, about a year before I went in the Army.

(Testimony of Robert M. De La Lama.)

Q. You had been a fur salesman for about a year, about a year prior to the time you went in the Army, is that correct? A. That is right.

Q. And how many years were you an automobile salesman?

A. Oh, about eight or nine years.

Q. And what did you do the year prior to your entry into the Army?

A. I don't quite get you.

Q. What was your occupation for the twelve months immediately preceding your induction into the U. S. Army? A. I had a card game.

Q. You had a card game? A. I did.

Q. What other occupation did you have?

A. Nothing much.

Q. Where was the card game?

A. In Phoenix.

Q. Where in Phoenix?

A. In Third Street between Washington and Adams, on the alley.

Q. What was the name of the place?

A. Didn't have no name.

Q. Was it a secret card game?

A. No, it wasn't secret. Everybody knew about it.

Q. What is that?

A. It wasn't secret. Everybody knew about it.

Q. Well, was it a card room or just a game?

A. Just a game.

Q. This bartender who introduced Mr. Van Treel and Mr. Olivey to you, what was his name?

A. Collins.

(Testimony of Robert M. De La Lama.)

Q. Did he have a nickname?

A. Tiger I think they called him.

Q. The Tiger? A. Yes.

Q. And how long had you known him?

A. Well, he is a local boy from Phoenix. He went to school with me.

Q. You have known him for years, is that right?

A. That is right.

Q. And he was also arrested for narcotics, wasn't he? A. I don't know.

Mr. Beardslee: Object to that as not cross-examination and immaterial.

The Court: Sustained.

Q. (By Mr. Pomeroy): Mr. De La Lama, after you met Mr. Olivey and Mr. Van Treel in the El Paso Buffet in Phoenix did you use their automobile for your own purposes?

A. No, I didn't.

Q. You never drove it? A. No, I didn't.

Q. Did they have an automobile?

A. I don't know.

Q. How did you go from the El Paso Buffet out to their auto court? A. In a car.

Mr. Beardslee: Let me suggest you keep your voice up.

The Court: Will you repeat your answer?

A. I borrowed an automobile to go down there.

Q. (By Mr. Pomeroy): From whom did you borrow the automobile? A. My brother.

Q. Is that the same brother that you came up here to visit?

A. No, it is another brother in Phoenix.

(Testimony of Robert M. De La Lama.)

Q. What is the first name of the brother that you borrowed the car from? A. Pete.

Q. And what is the name of the brother that you were coming to Tacoma to visit?

A. Mike.

Q. Now, Mr. De La Lama, why was it necessary for you to tell Mr. Olivey and Mr. Van Treel that you had swallowed the opium? Why didn't you tell them that you didn't want anything to do with it?

A. Because—I don't know, they asked me if I had swallowed it and I told them I had.

Q. Why didn't you tell them you didn't want anything to do with it?

A. I didn't want them to think that I was backing out on it.

Q. Backing out of it?

A. Of taking the stuff after they gave it to me.

Q. Why didn't you tell them you didn't want it?

A. I did, and they kept insisting and insisting that I take it.

Q. They insisted that you take this opium?

A. That is right.

Q. You had never seen it before? A. No.

Mr. Pomeroy: That is all.

Mr. Beardslee: That is all.

(Witness excused.)

Mr. Beardslee: I have another witness, if your Honor please, that I referred to the jury about. They tell me it is going to be necessary to have another order ad subjiendum. That is going to delay the trial. The last witness' testimony would

be very brief, and I don't consider it of sufficient importance to tie up the trial any longer, so I will waive it. We will rest with the renewal of my motion.

The Court: The defendant rests, is that what you say?

Mr. Beardslee: Yes, your Honor, and with respect to the motion made at the close of the government's case, does your Honor care to have that renewed to any extent?

The Court: You may, for the record, renew it and the Court will rule upon it upon your stating that it is renewed.

Mr. Beardslee: I now renew the motion made, if your Honor please, at the close of the government's case without further argument, in view of the fact——

The Court: The Court is ready to rule upon it, and the motion is denied.

Mr. Beardslee: Allow me an exception?

The Court: Allowed.

Mr. Pomeroy: No rebuttal.

(Whereupon, the jury was temporarily excused and the Court and counsel conferred in chambers.)

(The jury then returned to the jury box to listen to the closing arguments of respective counsel, and the instructions of the Court, to which neither side took any exceptions.)

(Whereupon, at 4:30 o'clock p.m. the jury retired to consider their verdict.)

State of Washington,
County of King—ss.

I, Helen K. Wilkinson, do hereby certify that I acted as the official court reporter in the above-entitled court and as such was in attendance upon the hearing of the foregoing matter.

I Further Certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ HELEN K. WILKINSON,
Acting Official Court
Reporter.

[Endorsed]: No. 11664. United States Circuit Court of Appeals for the Ninth Circuit. Robert M. De La Lama, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 4, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11665

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CARLOS ROMERO OCHOA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

JAN 21 1948

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No. 11665

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CARLOS ROMERO OCHOA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Sections 253, 254 and 454 of Title 18 of the United States Codes. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41(2)). The offenses charged were committed in Riverside County, State of California [R. T. 2-15].¹ Judgment was entered on May 19, 1947 [R. T. 13]. A pauper affidavit and order was filed May 20, 1947 [R. T. 20]. Notice of appeal was filed May 22, 1947 [R. T. 22]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹The references preceded by the symbol "R. T." are to the typewritten transcript of record on appeal; those preceded by the symbol "A. B." are to Appellant's Brief on Appeal; those preceded by the symbol "R." are to the typewritten Reporter's Transcript of Proceedings.

Statutes Involved.

A. Section 253 of Title 18, United States Code, provides:

“Killing federal officer; penalty

Whoever shall kill, as defined in sections 452 and 453 of this title, . . . any immigrant inspector or any immigration patrol inspector . . . while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under section 454 of this title.”

B. Section 254, of Title 18, United States Code, provides:

“Resisting, interfering with or assaulting federal officer; penalty

Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than \$5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than \$10,000, or imprisoned not more than ten years, or both.”

C. Section 452, Title 18, U. S. C., provides as follows:

“Murder; first degree; second degree. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate,

malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.”

D. Section 453, Title 18, U. S. C., provides as follows:

“Manslaughter; voluntary; involuntary. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”

E. Section 454 of Title 18, United States Code, provides:

“Punishment; murder; manslaughter. Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding \$1,000, or both.”

F. Section 567, Title 18, U. S. C., provides as follows:

“Verdicts; qualified verdicts. In all cases where the accused is found guilty of the crime of murder

in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

Statement of the Case.

An indictment in two counts was returned by the Grand Jury, in the February, 1947, Term and filed on April 9, 1947 in the United States District Court for the Southern District of California, Central Division, charging appellant with violation of Sections 253, 254 and 454 of Title 18 of the United States Code [R. T. 2].

Count One charged that appellant with premeditation and by means of shooting, murdered an Immigration Patrol Inspector, engaged in the performance of his official duties [R. T. 2]. Count Two charged that appellant assaulted with a deadly weapon, namely, a .32 caliber automatic pistol, an Immigration Patrol Inspector, engaged in the performance of his official duties [R. T. 3].

Appellant pleaded not guilty to each count of the indictment [R. T. 5] and the case was tried before the Court and a jury on April 30, 1947, and May 1, 2, 6, 7 and 8, 1947 [R. T. 15].

The jury found the appellant guilty of first degree murder on Count One, and guilty of assault of a Federal officer with a deadly weapon on Count Two.

Thereafter, following appellant's motion in arrest of judgment [R. T. 13] the District Court sentenced appellant to suffer the death penalty on Count One, and sentenced appellant to 10 years imprisonment on Count Two [R. T. 13, 18].

Statement of Facts.

On the evening of March 11, 1947 John Louis Fouquette and Anthony Leo Oneto were Immigration Patrol Inspectors of the Immigration and Naturalization Service, U. S. Department of Justice, stationed at Indio, California [R. 122, 135]. They were assigned to duty on Highway 99, south of Indio [R. 123-7] to apprehend aliens unlawfully in the United States, and persons smuggling aliens into the United States [R. 123]. They went out on duty together at approximately 4 P. M., in a Government patrol car [R. 135]. Both wore uniforms [R. 136].

At approximately 7:15 P. M. they set up a check station at a point known as Travertine Rock on Highway 99, approximately 24 miles south of Indio [R. 136]. A check station is a watch point where the officers set up a stop sign and red light to stop oncoming traffic and check it [R. 136].

The evening was quite dark [R. 137]. At about 8:15 P. M. a Chevrolet coupe driven by appellant was stopped by the inspectors at the check station [R. 138]. They found four alien Mexicans [See R. 179, 186] in the Chevrolet and placed them in the rear seat of the Government car [R. 138].

The officers instructed appellant to drive his car ahead of the government car [R. 375]. With appellant's car immediately preceding the government's automobile [R. 139] they drove up the highway toward Indio [R. 139]. After a stop at Oasis station [R. 140], they proceeded towards Indio in the same manner as before [R. 140]. Approximately four miles south of Indio [R. 141] the officers noticed that appellant's car appeared to be driving with difficulties [R. 141] which lasted for approximately two

miles [R. 141]. The appellant had decided to stop and get away. He knew the ignition switch on his car was bad, so he had turned the switch on and off several times trying to find the place where there was a bad contact. He could not find it so he decided to stop anyway [R. 375]. On the seat beside him [R. 34] appellant had a .32 caliber gun, which he had purchased three weeks before in El Centro [R. 374]. He put the gun in his left pants pocket. Appellant pulled the Chevrolet over onto the shoulder of the highway [R. 142], turned the switch off [R. 376] and stopped abruptly [R. 141]. Inspector Fouquette was driving the government car and pulled onto the shoulder of the road directly behind and within a foot or two of appellant's car [R. 141]. Inspector Oneto was in the front seat to the right of Inspector Fouquette [R. 177]. The appellant immediately got out of his car on the driver's side and commenced walking back to the government car on the driver's side [R. 142]. When he reached a point even with the front fender of the government car, appellant stated that "his gasoline seemed to be plugged." Inspector Fouquette told him to get back to the car and that they would push it into Indio with the government car. Appellant repeated "on to Indio" and continued towards the government's car on the left side, to the front seat of the government's car. Appellant pointed the .32 caliber automatic pistol into the government's automobile and stated, "You fellows put your hands up" and then immediately commenced firing into the car [R. 143, 171].

Inspector Fouquette received a through and through flesh wound in his right shoulder [R. 149]. Inspector Oneto was shot between the eyes [R. 194, 205]; suffered one bullet wound over the left cheek, had two holes

in the frontal scalp, and a crease mark across the left shoulder [R. 96]. The bullet that entered between Inspector Oneto's eyes proceeded directly through the base of his brain and lodged in the back of his neck. Another bullet was also recovered from his brain [R. 96].

Inspector Fouquette opened the door of the car [R. 144] and glimpsed the appellant running around the back of the government car and getting away amongst the trees [R. 144, 376]. Appellant walked several miles to his sister's house [R. 376].

Inspector Fouquette returned to the government car and found Inspector Oneto with his feet up, on the other side of the front seat [R. 145]. He felt of Inspector Oneto's pulse and Inspector Oneto was dead at that time [R. 145]. The cause of Inspector Oneto's death was determined to be maceration of the brain due to bullet wounds [R. 96-97].

The reason appellant shot the officers was because he wanted to get away [R. 376]. On May 18, 1944, the appellant was convicted on two counts in the Federal District Court for the Southern District of California, Southern Division, for violation of U. S. C. Title 8, Sec. 144; and U. S. C. Title 18, Sec. 88. The imposition of sentence on each count was suspended for three years, on the probation condition, amongst others, that appellant would not violate any laws of the United States, State, County or City in which he resides [R. 386].

The facts of the case were undisputed. It was admitted by defense counsel, in his opening statement to the jury, that appellant had killed Inspector Oneto. Appellant's primary defense was that he was insane (See A. B. 3).

ARGUMENT.

I.

The Manner in Which the Trial Judge Examined the Expert Witness Dr. Thomas H. Leonard, Was Proper and Did Not Constitute Prejudicial Error.

Questions by the trial court are given an interpretation and meaning by appellant (A. B. 7 ff.) which they did not have at the time they actually occurred. Such questions must be examined in the light of the circumstances at the time they were made.

In *United States v. Warren*, 120 F. (2d) (C. C. A. 2, 1941), the Court said (p. 212):

“Indeed the disposition of the courts to reverse judgments because of minor excesses in the exercise of the Judges authority at the trial has much abated; separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve.”

We discuss below appellant's assertion that the manner in which the trial judge examined the witness, Dr. Leonard, constituted prejudicial error (A. B. 3), but it should be noted at the outset that his complaint is essentially based on the fact that the trial judge participated in bringing out the full facts on the question of insanity for the consideration of the jury. Appellant has plainly aligned himself with those litigants who “become over critical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause.” (*United States v. Breen*, 96 F. (2d) 782, 784 (C. C. A. 2, 1938).)

The witness, Dr. Thomas H. Leonard, was called by the trial court as its expert witness, as a part of the ap-

pellant's case. Appellant's counsel, upon his request, was permitted by the trial court to ask the witness leading questions [R. 296, l. 1.]

The trial judge, under the federal system, is not only permitted, but it is his duty to participate directly in the trial and to facilitate its orderly progress. (*Hargrove v. United States*, 25 F. (2d) 258, at 259 (C. C. A. 8, 1928).) It is his duty to shorten unimportant preliminaries. The purpose of the trial is to arrive at the truth. (See *Lewis v. United States*, 11 F. (2d) 745, 747 (C. C. A. 6, 1926).) In performing his duties, it may become necessary to shorten the examination of witnesses by counsel, and there is no reason why the trial judge should not ask a witness questions when it becomes essential to the development of the case.

In this regard, the court in *Kirk v. United States*, 280 Fed. 506 (C. C. A. 8, 1922), at page 507, said:

"The next specification is that the trial judge took over the examination of witnesses for the government and by interference prevented the cross-examination of witnesses. The record discloses that he interrogated the witnesses to an unusual extent. But his authority in this respect when exercised in a non-prejudicial manner, and subject to the same exceptions as if conducted by counsel cannot be questioned. 38 Cyc. 1316; 26 R. C. L. 1925, 1926. We have been unable to discover any resulting prejudice to the defendants from the inquiries made in this case. Cases are relied upon wherein the fair limitations of inquiry were exceeded, but we find them either inapplicable or not authoritative in the federal courts."

Questions by the trial court which are intended to clarify the testimony of the witnesses were proper. Thus, in *Kirkpatrick v. United States*, 299 Fed. 226 (C. C. A. 9, 1924), the Court, at page 226, said:

“Counsel for Kirkpatrick say that the trial was unfair because of the attitude of ‘the Court,’ and particularize by citing several instances where a witness, having answered a question put by counsel, was asked by the judge whether he meant a definite matter as stated by the judge. For example, a witness in describing his movements said that he and defendant, Kirkpatrick, unloaded five cases of whiskey; the Court interposed by asking, ‘You mean sacks?’ No objection was made on the trial by defendant’s counsel, no exception was recorded and apparently during the trial no attention was paid to the matter. Plainly such interrogatories by the Court were intended not to alter but merely to clarify the testimony. There is nothing from which it is to be inferred that the Court, by asking the question, displayed unfairness or prejudice.”

It is proper for the trial court to confine the inquiry to relevant matters. See *Callahan v. U. S.*, 35 F. (2d) 633, 634 (C. C. A. 10, 1929).)

In reviewing the actions of the trial judge we refer to his instructions to the jury, which specifically charge:

“During the course of the trial I have asked questions of certain witnesses. *My object was to bring out in greater detail facts not then fully covered in the testimony.* You are *not to assume* that I hold any *opinion* as to the matters to which the questions related. Remember at all times that you, as jurors, are at liberty to *disregard all comments* of the court in arriving at your own findings as to facts.” [R. 458, l. 17]. (Italics ours for purpose of emphasis.)

As a psychiatrist, the witness, in attempting to reconcile the therapeutic standards of his own art with the moral judgments of the criminal law, became confused. (See *Holloway v. United States*, 148 F. (2d) 665, at 666 (C. C. A., D. C. 1945).)

The witness [R. 330, l. 20] stated:

“I know your honor, that your legal minds dwell a great deal upon the difference between right and wrong; but from a strictly psychiatric point of view, that is the reactions of the mind, when the individual is about to commit that crime, that capital crime, he is not reasoning at all.”

Upon examination by appellant's counsel the witness stated that appellant “has a deficiency mentality” [R. 312]; that he has an intelligence quotient of about 10½ years [R. 313]; that he “needs supervision on account of his dual personal makeup” [R. 14]; that “when provoked he exercises little or no reason and may become dangerous to others and himself; knows right from wrong” [R. 314]; that he has a split personality [R. 314]; that he had difficulty determining whether appellant would know right from wrong when provoked, or he is in a temper tantrum [R. 314-315]; that his dominant reactions were those of a mental defect [R. 316]; that on March 11th when appellant used the gun he was exercising one of his temper tantrums [R. 316].

Upon cross-examination by counsel for the government, the witness stated that appellant knew right from wrong on March 11, 1947 [R. 320]; that a person with a split personality of appellant's type, “at the time he is provoked is insane.” By insane he meant “he becomes unable to adjust himself agreeably to his environment and may be-

come dangerous" [R. 320]; that an individual in a wild rage, extremely angered state of mind, "at that particular time he is not responsible for his act, that he is insane" [R. 323]; that it is difficult to answer "whether an otherwise normal person under extreme stress, when he is in a rage, is sane or insane" because this is answering a question he did "not think has been answered by any of his co-workers satisfactorily. When a person is provoked is the time they usually commit crime" [R. 324]. That during a tantrum appellant would be in a state of mind to plan and devise a scheme. "His plan might be illegal and conflict with the general trend and opinions of the people in the community in which he lived, but they were plans for him and he would probably proceed on plans of his own at such time." He would not "be able to proceed with a rational plan to accomplish an otherwise normal person would employ if he had that object in mind." At such time "he is conscious of what he is doing but lacks that reasoning the normal individual usually exercises . . . he will throw everything to the winds and go through with his one idea, without reason. It is reason that differentiates this man from the normal individual" [R. 325]; that "any person who commits crime, momentarily or at the moment is not exercising reasoning" [R. 327].

This witness was called by the trial court as an expert witness. The questions the Court asked were proper and necessary. A careful examination of the questions asked by the trial court [R. 327 ff] will convincingly establish that they were intended only to bring out the full facts as to this expert witness' meaning of insanity for the consideration of the jury without prejudice to the defendant, except in so far as a full presentation of the facts

might have that incidental effect. This is fully borne out by instructions of the trial court to the jury on the question of insanity [R. 456-457-458].

We submit that examination of the record in each instance will disclose that no reversible error was committed.²

II.

The Argument of Counsel for the Government to the Jury Was Not Prejudicial to the Appellant.

Appellant in his opening brief (A. B. 36) raises, for the first time the objection that the argument of counsel for the government to the jury was improper and prejudicial to appellant.

No objection was made during or immediately following the argument of the prosecutor referred to, nor was the Court requested to interrupt it, or caution the jury against its force; and no exceptions were taken.

It was the duty of appellant at once to call the attention of the Court to the objectionable remarks, and request its interposition and, in case of refusal, to note an exception. (See *Crumpton v. United States*, 138 U. S. 361 (1891); *Carlisle v. United States*, 66 F. (2d) 666 (C. C. A. 5, 1933); *DeBonis v. United States*, 54 F. (2d) 3, (C. C. A. 6, 1931); *McIntosh v. United States*, 1 F. (2d) 427 (C. C. A. 7, 1924).)

Only in the most exceptional cases can an appellant remain silent and interpose no objection and after ver-

²No useful purpose would be served in reproducing in detail in this brief those portions of the record involved. We believe that the Court will obtain a better perspective of what transpired by direct reference to the transcript.

dict has been returned object that the prosecution made improper remarks to the jury. (See *Bratcher v. United States*, 149 F. (2d) 742 (C. C. A. 4, 1945); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 339 (1940).)

In *Dale v. United States*, 66 F. (2d) 666 (C. C. A. 5, 1933), the Court, at page 667, stated:

“Omission to complain in time persuasively suggests that even counsel, deeply interested in the case, were not then so impressed with the significance of the misstatements as to call the Court’s attention thereto. Generally it may be safely said that, if such misstatements did not at the time sufficiently impress counsel as being harmful, it is not likely that they materially affected the jury.”

However, considering the question raised here by appellant, it is well settled that the remarks of a prosecutor do not constitute a basis for reversal unless they result in prejudice to the accused. (See *Bratcher v. United States*, *supra*, at page 746.)

The present case is clear and strong. The evidence relating to the killing of the Immigration Officer is overwhelming and uncontradicted, and unquestionably established that appellant shot and killed him. Appellant concedes that the “facts of the case were undisputed and that the defense counsel, in his opening statement to the jury, admitted that the Immigration Officer was killed and that appellant had killed him” (A. B. 3).

The statements to which appellant now objects do not constitute prejudicial error. It is difficult to imagine that the minds of the jurors in a case such as the present one, would be influenced by such statements during the closing argument to the extent that they would not appraise the

evidence objectively and dispassionately. (See *United States v. Socony, supra*, at page 239.)

Appellant objects that several of the prosecutor's remarks were outside the evidence. As stated in *Dunlop v. United States*, 165 U. S. 486, 498, "if every remark made by counsel outside the testimony were grounds for a reversal, comparatively few verdicts would stand."

A reading of the record will convince that the statements of the counsel for the government were minor aberrations, if at all, in a long trial and not cumulative evidence of a proceeding dominated by passion and prejudice.

Counsel for the Government had a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to *make reply to that made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper.*

See:

Malone v. U. S., 94 F. (2d) 281, 288 (C. C. A. 7, 1938);

Rice v. U. S., 35 F. (2d) 689 (C. C. A. 2, 1929);

Baker v. U. S., 115 F. (2d) 533, 544 (C. C. A. 8, 1940);

Sheridan v. U. S., 118 F. (2d) 828, 856 (C. C. A. 9, 1941).

To set forth a further analysis of the alleged improper statements by counsel for the government during the argument to the jury would unduly prolong this brief. We submit there is nothing in the argument which would constitute reversible error. Though vigorous and forcible it is as fair to the appellant as might be reasonably expected under the circumstances. A reversal would not promote the ends of justice.

III.

The Jury Was Correctly Informed of Its Prerogative
to Recommend Against Capital Punishment.

The Supreme Court, in *Winston v. United States*, 172 U. S. 303 (1899) (cited in A. B. 44), states the rule with regard to qualified verdicts of guilty in cases of murder, at page 313:

“The right to qualify a verdict of guilty, by adding the words ‘without capital punishment,’ is thus conferred upon the jury in all cases of murder. The Act does not itself prescribe, *nor authorize the Court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury.* The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the Court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it *extends to every case in which, upon a review of the whole evidence the jury is of the opinion that it would not be just or wise to impose capital punishment.*” (Italics ours for the purposes of emphasis.)

There is nothing in this opinion affirmatively requiring a charge by the trial court to the jury informing it that the right not to impose capital punishment is not limited to cases where there are palliating or mitigating circumstances. Rather, it points out that the Court cannot make *any rule defining or circumscribing the exercise of the right of the jury to qualify a verdict.* We should like to point out, also (with reference to A. B. 45) that the above Court’s opinion specified that the authority of the jury to decide that accused shall not be punished capi-

tally, extends to every case in which, *upon a review of the whole evidence*, the jury is of the opinion it would not be just or wise to impose capital punishment.

The actions of the trial court and the instruction it gave to the jury regarding their right to qualify a verdict of guilty, specifically left to the jury the entire discretionary power vested in it by Congress. The Court charged the jury as follows [R. 460]:

“Ordinarily, in a criminal case, I would not say anything to the jury with respect to the punishment, if any, to follow in event of conviction of the accused.

“. . . Section 567 of Title 18 of the United States Code provides that:

‘In all cases where the accused is found guilty of the crime of murder in the first degree . . . the jury may qualify their verdict by adding thereto (the words) “without capital punishment”; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.’

“Accordingly, if you find defendant, CARLOS ROMERO OCHOA, guilty of murder in the first degree, as charged in the First Count of the Indictment, the law gives you the *unrestricted right to decide whether or not he should suffer the death penalty. There are no rules to guide you in this decision*, and you should not interpret any instruction or any comment or other occurrence during the trial, or during the selection of the jury, as indicating how you should reach a particular decision, regarding the death penalty, *since those are matters which are left entirely*

to the discretion of the jury.” (Italics ours for purpose of emphasis.)

See also R. 461 and 465.

We respectfully submit, that this charge makes no reference or limitation indicating that mitigating or palliating circumstances must be present for a qualified verdict. It leaves the entire matter wholly to the judgment, conscience and discretion of the jury, alone, as required under the law.

IV.

The Indictment Which Is Based Upon the Form Prescribed by the United States Supreme Court, Is Adequate.

The Rules of Criminal Procedure for the District Courts of the United States covering proceedings in criminal cases prior to and including the verdict, finding of guilty or not guilty by the Court, or plea of guilty, were prescribed by the Supreme Court, pursuant to the Act of June 29, 1940, c. 445, 554 Stat. 668.

As provided in that Act, these rules were reported to Congress at the beginning of the regular session of Congress commencing on the third day of January, 1945, by the Attorney General of the Department of Justice. They became effective March 21, 1946. (Title 18, U. S. C., following Sec. 687.)

The Supreme Court in the Appendix of Forms to the Federal Rules of Criminal Procedure (18 U. S. C., fol-

lowing 687) prescribed the form of indictment for murder in the first degree of a federal officer.³

Title 18, U. S. C., Sec. 687, in respect to said rules, provides, that upon the close of such session of Congress and thereafter, "All laws in conflict therewith shall be of no further force or effect."

The rules of practice and procedure in criminal cases adopted by the Supreme Court have had the force of federal statutes.

See:

Galagher v. U. S., 82 F. (2d) 721 (C. C. A., 1936);

Cook v. Swope, 28 F. Supp. 492 (D. C. Wash., 1939);

United States v. Infusino, 131 F. (2d) 617 (C. C. A., 1942).

³Thus "Form 1. Indictment for Murder in the First Degree of Federal Officer," provides:

In the District Court of the United States for the.....
District of.....Division

United States of America) No.
v.) (18 U. S. C. A. §§253, 452)
John Doe)

The grand jury charges:

On or about the.....day of....., 19.....,
in the.....District of.....,
John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A TRUE BILL.

.....
Foreman.

.....
United States Attorney

The murder count of the present indictment relating to the appellant [R. T. 2] in this case, specifically follows the language of the Supreme Court in "Form 1. Indictment for Murder in the First Degree of Federal Officer." We append the indictment, Count One, in the footnote.⁴

The Title of the Supreme Court's form and the present indictment specifically state that the indictment is for *murder in the first degree of a federal officer*. They specifically provide that appellant (a) with *premeditation and (b) by means of shooting (c) murdered a (d) federal officer (e) engaged in his official duties*. This form includes a statement of all of the necessary allegations of the offense.

A premeditated killing is murder in the first degree, and it is wilful, deliberate and expressly malicious. In

⁴ In the District Court of the United States
In and for the Southern District of California
Central Division

February, 1947, Term

United States of America, Plaintiff, v. Carlos Romero Ochoa,
et al., Defendants. No. 19269.

INDICTMENT

(U. S. C., Title 18, Secs. 253, 254, 454, and 551—murder and assault of federal officers, accessory after the fact)

The grand jury charges:

COUNT ONE

(U. S. C., Title 18, Sections 253, 454, 551)

On or about March 11, 1947, in Riverside County, California, within the Central Division of the Southern District of California, defendant Carlos Romero Ochoa, with premeditation and by means of shooting, murdered Anthony Leo Oneto, who was then an officer of the Immigration and Naturalization Service of the United States Department of Justice, to-wit: an immigration patrol inspector, engaged in the performance of his official duties.

this regard, in *State v. Clifford*, 17 N. W. 304, 307, 58 Wash. 477 (1883), at page 487 it is noted:

“A premeditated killing is murder in the first degree, and can be nothing else, because it implies the lying in wait and malice aforethought, and settled design. It is willful, deliberate and expressly malicious, and, of course, these elements exclude all extenuating circumstances or conditions and the courts can make none.”

See:

King v. State, 20 S. W. 169, 91 Tenn. (Pickle) 617, 646 (1892).

Compare the language in *Borden v. United States*, 15 F. (2d) 17 (C. A. D. C., 1945), where the Court, at page 18, said:

“The perpetration of a robbery during which a homicide is committed, legally takes the place of *that premeditation to kill which is necessary for murder* in the first degree.” Citing *Sloan v. State*, 70 Fla. 163, 169, So. 891. (Italics ours for purpose of emphasis.)

The terms “premeditation” or “premeditated design” have been variously used as synonymous with or including the following terms: “willful,” see *Aubrey v. State*, 62 Ark. 368, 35 S. W. 792 (1896); “deliberate,” see *White v. State*, 236 Ala. 124, 181 So. 109 (1938); “deliberate design, malice aforethought,” see *Hawthorne v. State*, 58 Miss. 778, 783 (1881); “malice aforethought,” *State v. Scifert*, 118 Pac. 746, 748, 65 Wash. 596 (1911).

The general attitude of the federal courts with regard to criminal pleadings is stated in *Hopper v. United States*, 142 F. (2d) 181 (C. C. A. 9, 1944), at page 184:

“At least since *Hagner v. United States*, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861, the federal courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations.”

Under the present Criminal Rules it is only necessary that “The Indictment or the Information shall be plain, concise and a definite written statement of the essential facts constituting the offense charged.” Rule 7(c). The spirit and intent of the Criminal Rules is indicated by the Appendix of Forms which have been given official illustrative status by Rule 58. The previous precision and detail that was held necessary to charge an offense are no longer necessary. See *Lowery v. United States*, 161 F. (2d) 30, 35 (C. C. A. 8, 1947). Cert. denied. See 67 S. Ct. 1737. See *United States v. Agnew*, 6 F. R. D. 566 (D. C. E. D. Penn., 1947).

The record clearly shows appellant was not prejudiced in any possible manner by the pleadings. He was clearly apprised by the Indictment of what he must be prepared to meet, and the record indicates that he was so fully prepared.

We necessarily conclude that the Supreme Court, in providing its *own* “Form 1, Indictment for Murder in First Degree of Federal Officer,” was fully cognizant of the law and did purposely and intentionally set forth what it considered to be “a plain, concise and definite written statement of the essential facts constituting the offense” of murder in the first degree of a federal officer.

Conclusion.

This is a case in which the evidence is undisputed that appellant shot and killed a federal officer. There was no reversible error committed by the trial court in the conduct of the trial, by counsel for the Government in its argument to the jury, or in the Court's instructions given to the jury. The indictment was adequate and the appellant had a fair and full trial. There is no reason for setting aside the verdict in the lower court's judgment. The judgment should be affirmed.

Respectfully submitted,

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No. 11,667.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLANT.

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FILED

MAR 13 1948

PAUL P. O'BRIEN, CLERK

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No. 11,667.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is a suit for infringement of United States Letters Patent and the District Court of the United States for the Southern District of California, Central Division had jurisdiction under 28 U.S.C.A. 109. An interlocutory decree finding infringement of certain of the claims in suit having been entered in said District Court, this Court of Appeals has jurisdiction under 28 U.S.C.A. 225 and 227.

The First Amended Complaint filed in the District Court is reproduced on pages 2, 3 and 4 of the Record, and the First Amended Answer of Defendant appears on pages 8-14, incl., of the Record, said Answer including a Counterclaim as set forth on pages 12 and 13 of the Record. Plaintiff's reply to said Counterclaim appears on pages 18 and 19 of the Record.

Statement of the Case.

The patent in suit No. 1,906,260, was issued to the Plaintiff, John T. Gibbs, on May 2nd, 1933, on a patent application filed by him on February 16, 1931.

The patent discloses and claims an electrified version of the well-known games variously called Bingo, Keeno or Tango [R. 100, 171]. These games, hereinafter usually referred to as Bingo games, were an outgrowth of the old game of Lotto [R. 231] and were played by a number of competing players each provided with a card having five rows of five numbered squares thereon. A large basket or box having a plurality of numbered open compartments therein was disposed in back of the counter before which the players sat. Each player in rotation had a chance to throw a ball into the basket and the number of the pocket into which the ball fell was called out by the operator. Each player then placed a marker on his card in the square bearing the number called. The first player to get five markers in a line, either horizontally, vertically or diagonally was declared the winner [R. 69, 70, 232].

The Gibbs game of the patent in suit comprises a plurality of electrically interconnected game units, operated by separate players who compete with each other. Each unit has a playing board with five rows of five holes therein, and an annunciator backboard with five rows of five indicator lights. Each light is connected to a switch under a corresponding hole in the playing board and when a ball goes through one of said holes after being rolled across the board by the player the indicator light corresponding to that hole is energized and remains illuminated during the play. The first player to light up five of said

indicator lights in a row, either horizontally, vertically or diagonally is declared the winner.

When the ball goes through the fifth hole in a line, a win circuit is completed which lights a win light on top of the annunciator panel of the winning game, rings a bell to notify the operator and players of the win, and simultaneously disconnects the competing game units to prevent the other players from continuing the play and possibly claiming a tie game. [See Alternate Proposed Finding XVII, R. 24, and patent in suit, R. 303].

The Plaintiff has enjoyed a lucrative business in licensing his games to amusement parks throughout the country. From time to time alleged infringers have appeared and been sued by Plaintiff, and in most of the cases, consent decrees were taken and the Defendants given a license by the Plaintiff to continue operation of their games. One Defendant, the T.Z.R. Amusement Corporation in New York who, the evidence showed had clearly and deliberately copied Plaintiff's game in practically all of its details, contested Plaintiff's suit and lost the decision in the District Court (*Gibbs, et al. v. T.Z.R. Amusement Corp., et al.*, 14 Fed. Supp. 957), the decision and findings of fact of said suit comprising Plaintiff's Exhibit No. 3 [R. 346].

About two years prior to the commencement of this suit the Defendant Todd C. Faulkner built and operated an electro-mechanical Bingo game on the Pike in Long Beach, California, under the name of "FAWN." The outward appearance and method of play of the Fawn game were similar to some electrified Bingo games then being operated on the Pike as Lite-A-Line by Arthur Loeff and

Douglas Wiser, partners doing business as "Skill Games" which were in turn somewhat similar in outward appearance and method of play to the Gibbs game.

Early in 1946 Gibbs sued Looft and Wiser for infringement of the patent here in suit and on August 27, 1946 said case was settled by the entry of a consent judgment [R. 355] and the granting of a license to Looft and Wiser for the City of Long Beach. Immediately thereafter Plaintiff started suit No. 5565-W against C. M. Hicks, *et al.*, doing business on the Pike as "Skill-A-Line" and against this Defendant, Todd C. Faulkner, No. 5566-Y, doing business on the Pike as the Fawn Game. The Defendants Hicks *et al.*, shortly thereafter stipulated to a consent decree for Plaintiff and went out of business. The Defendant Faulkner elected to stand and fight.

An Amended Complaint [R. 2] was filed on August 29, 1946 naming the Appellant, Todd C. Faulkner, and his wife, Edna D. Faulkner, as joint Defendants. At the trial said Complaint was dismissed as to Edna D. Faulkner.

On October 9, 1946 Plaintiff moved for a preliminary injunction and in support of said motion filed a description of the charged Fawn games and their mode of operation [R. 309]. Said motion was not contested and on November 12, 1946 an order for a preliminary injunction was issued by Judge Yankwich pursuant to which a writ of preliminary injunction was issued out of the District Court.

In the meantime Defendant had changed the construction, electrical circuits and method of play of his accused Fawn game, making it a non-competitive game in which the various players played against a clock instead of against each other and consequently there might be several winners instead of merely one as before. This modified or altered game is now being operated by Defendant and will herein be referred to as the "New Fawn Game."

The Defendant made a full disclosure to Plaintiff's counsel of his new Fawn game and requested Plaintiff to include it in this suit if Plaintiff thought that it infringed his patent. This the Plaintiff declined to do, either by contempt proceedings or by Amended Complaint, and consequently on January 7, 1947, Defendant filed Interrogatories [R. 5] to compel Plaintiff to state whether or not he charged the new Fawn game to be an infringement of his said patent.

Plaintiff objected to said Interrogatories, but was required by the Court to answer Nos. 1, 2 and 3 thereof. Therefore Defendant filed his First Amended Answer [R. 8] which included a Counterclaim [R. 12] alleging a controversy between the parties concerning the new Fawn game and praying for a declaratory judgment of non-infringement of *both* Fawn games and *invalidity* of the Gibbs' patent.

Subsequent to the filing of said Amended Answer Plaintiff filed his answers to said Interrogatories [R. 15] in which he charged said new game to infringe, and on

the day of trial Plaintiff filed his reply to Defendant's Counterclaim denying all of the essential allegations thereof.

Said case was tried on both issues, to-wit: (1) the alleged infringement of the old competitive Fawn game, and (2) the alleged infringement of the new *non*-competitive Fawn game. Following the trial of these issues oral argument was had, during the latter portion of which there was an extended colloquy between the Court and counsel for Plaintiff [R. 258-281] and the Court gave its decision orally from the bench [R. 282-289].

The trial court first held that the old game infringed all the claims in suit and that the new Fawn game infringed claims 3, 7, 8, 9 and 10, but not claim 6 because it was a non-competitive game [R. 287]. Upon the attention of the Court being called to the fact that claims 7 and 8 were dependent upon claim 6 and therefore could not possibly be infringed since parent claim 6 was not infringed, the Court modified its holding and ruled that only claims 3, 9 and 10 were infringed by the new Fawn game [R. 288, 289]. Defendant then pointed out to the Court that claims 9 and 10 were narrower versions of broad claim 6 and therefore, like 7 and 8 could not possibly be infringed, but the Court declined to further modify its ruling.

The Plaintiff presented a set of generalized Findings of Fact and Conclusions of Law [R. 33-40] and the Defendant presented Alternate Findings and Conclusions [R.

20] which were thought to more accurately conform to the statements made by the trial court in its discussion with counsel and in its oral decision from the bench. However, the Court rejected all of Defendant's Alternate Findings and signed without change the Findings of Fact and Conclusions of Law submitted by Plaintiff and also the Interlocutory Judgment [R. 41] submitted by Plaintiff, which Judgment was entered on March 31, 1947.

This appeal is prosecuted from said Interlocutory Judgment and raises three principal issues as follows:

- (1) Is the Gibbs patent valid?
- (2) Does the new Fawn game infringe the Gibbs patent?
- (3) Did the old Fawn game infringe said patent?

These major issues are of course subdivided into minor issues as detailed in the Assignment of Errors and Argument hereinafter set forth.

At this point however, it is desired to call this Court's particular attention to the *most* glaring of the trial court's many errors, to-wit: that of holding narrow claims 9 and 10 infringed by the new Fawn game when broad claim 6 directed to exactly the same subject matter was held *not* infringed by the new game.

An equally basic error was made by the trial court in holding claim 3 infringed by the new Fawn game when obviously one of the essential elements of claim 3 is totally lacking in said game.

Specification of Errors.

In Appellant's statement of points upon which Defendant-Appellant intends to rely on appeal [R. 48] the various errors of the trial court are individually set forth. Here, in accordance with Rule 20 we have grouped the errors in accordance with the issues involved and related them to the Findings of Fact and Conclusions of Law on file herein.

AS TO THE ISSUE OF VALIDITY:

1. The Court erred in holding the claims in suit valid and that the public in general has acquiesced in said validity [Appeal Points 1 and 6, R. 48; Findings IV, VII, VIII, IX, X and XIV, R. 34-38].
2. The Court erred in not finding claims 3, 6, 7 and 8 of the Gibbs patent invalid for lack of novelty [Appeal Point 12, R. 49; Findings X and XIV, R. 36, 39].
3. The Court erred in not holding claims 9 and 10 invalid for ambiguity, indefiniteness, and failure to particularly point out and distinctly claim the alleged invention [Appeal Points 7 and 14, R. 48, 49; Finding VIII, R. 35].
4. The Court erred in not finding all of the claims in suit invalid for lack of invention [Appeal Point 13, R. 49; Findings X and XIV, R. 36, 38].

AS TO THE ISSUES OF INFRINGEMENT:

5. The Court erred in holding that the new Fawn game infringed claims 3, 9 and 10 of the patent in suit [Appeal Points 3 and 15, R. 48, 50; Findings XII and XIV, R. 37, 38].

6. The Court erred in holding that the new Fawn game has the same physical structure, functions, appearance and circuits, with allegedly minor exceptions, as the old Fawn game [Appeal Points 9 and 10, R. 48; Finding XII, R. 37].
7. The Court erred in holding all of the claims in suit infringed by the old Fawn game [Appeal Points 2 and 15, R. 48, 50; Findings XII and XIV, R. 38].
8. The Court erred in not following the general rule of law that the omission of an element of a patent claim avoids infringement of that claim [Appeal Point 17, R. 50; Findings XII and XIV, R. 37, 38].

AS TO ALL ISSUES:

9. The Court erred in its interpretation of the evidence, particularly the prior art, and in applying a narrow construction to the claims when considering the issue of validity, and a broad construction to said claims when considering the issue of infringement [Appeal Point 16, R. 50; Findings X, XII and XIV, R. 36-38].
10. The Court erred in not adopting the Alternate Findings of Fact and Conclusions of Law presented by Defendant which were more in consonance with the Court's oral opinion than were the Findings submitted by Plaintiff and adopted by the Court [Appeal Point 18, R. 50; Alternate Findings of Fact and Conclusions of Law, R. 20-32].

11. The Court erred in holding that the Plaintiff was entitled to an injunction, accounting, costs of suit and reasonable attorney's fees and in dismissing Defendant's Counterclaim with prejudice [Appeal Points 4 and 5, R. 48; Conclusion 4, R. 40].
12. The Court erred in holding that the Defendant derived his Fawn game from a game operated by Arthur Looff and that said Looff game had been copied from a game embodying the subject matter of the Gibbs patent [Appeal Point 11, R. 49; Finding XIII, R. 38].

Summary of Argument.

In addition to the usual issues of novelty and infringement present in all patent cases, the decree in this case presents a point that seldom appears on appeal, to-wit, the anomalous situation of a Decree holding non-infringement of a broad claim of the patent, but infringement of narrow claims thereof directed to the same subject matter covered in the broad claim. Such a holding is of course inconsistent on its face.

Appellant also finds it necessary to urge on this Appeal the correctness of the elementary rule of patent law, that omission of an element of a claim avoids infringement of that claim. This rule is usually not disputed. (See Appendix, Law Point 5.)

The failure of the trial court to follow the above-mentioned basic rules of patent law is the only reason for the Defendant's new Fawn game being involved in this Appeal.

The first error above-mentioned was committed by the trial court when, after holding broad claim 6 of the Gibbs

patent not infringed by the new Fawn game, it held narrow claims 9 and 10 directed to the same subject matter to be infringed. The exact element of claim 6 which the court found lacking in the new Fawn game is also present in claims 9 and 10. The second error above-mentioned was committed when the trial court in holding claim 3 to be infringed by the new Fawn game utterly ignored the fact that the last element of claim 3 is totally lacking in said new Fawn game.

Appellant has been sorely tempted to treat the above issues first in his brief since they are so easily disposed of, but a more logical presentation of the entire case requires that we first consider validity so that the Court will be fully apprised of the scope, if any, of Plaintiff's Patent, and then treat the issues of infringement. It is on this basis that our argument is arranged.

It is worthy of note at this point that the Findings of Fact presented by the Plaintiff and signed by the trial court without change, lay no foundation whatsoever for that portion of the Decree which finds infringement of claims 3, 9 and 10 by the new Fawn game. Likewise, there is nothing in the Court's opinion or in the Court's extended discussion with counsel for Plaintiff at the close of Plaintiff's argument to indicate the reasoning followed by the Court in arriving at its decision. For this reason we have collected and annotated in the Appendix a list of all of the statements of the trial court during the trial which may throw some light on the above rulings.

I. The Issue of Validity.

This issue may logically be divided into two parts comprising first a consideration of claim 3 which is a sub-combination claim directed to one of the individual game units disclosed in the Gibbs patent, and second, a consideration of claims 6-10, incl. which are directed to the entire game comprising a plurality of the individual units defined in claim 3 electrically interconnected.

CLAIM 3 IS INVALID.

Claim 3 by its terms broadly claims the combination of elements which go to make up one of the Gibbs individual game units, the claim making generous use of the broad and unqualified term "means." When this claim is given its literal interpretation as was done by the trial court it reads squarely on the prior art patent to Nakashima [R. 375] and is consequently invalid.

Claim 3 is additionally invalid for lack of invention over the other prior art patents which show board and ball games with annunciator lights, in view of the win signal shown by Nakashima and the prior art patents directed to multi-unit competitive games, all of which employed win signals similar to that used by Gibbs and called for in claim 3. In view of the state of the art at the time Gibbs entered the field, it was not invention to add to any one of the board and ball game patents a win signal as shown by any of the multi-unit game patents and by Nakashima.

CLAIMS 6-10, INCL., ARE INVALID.

Of this group of claims, claim 6 is the broadest and in fact is so broad as to read squarely on the prior patent to Prina [R. 479]. Consequently, claim 6, and claim 7, which merely adds thereto a win signal as shown by Prina, are both invalid for lack of novelty. Claim 8 which adds to claim 7 the manually operated main power switch inherent in the Prina structure is therefore likewise invalid.

Claims 6-10 are also invalid for lack of invention since they merely recite the interconnection of a plurality of the Nakashima-type board and ball games in the old and well-known manner shown by the multi-unit game prior art patents to Prina, Chester, Higuchi, Wallace and Irsch. Gibbs contributed nothing to the art that was not previously known, since in the construction of his individual game units he merely followed the teaching of Nakashima and the other board and ball game patentees, and then hooked up his game units as taught by Prina, Chester and others, to make an electrified Bingo game.

The narrow claims in the Gibbs patent which were not sued on by the Plaintiff perhaps display invention, since they are directed to the particular operative parts employed by Gibbs in his Bingo game. However, the claims in suit are couched in such broad language that they are clearly invalid for lack of invention.

Claim 9 and its dependent claim 10 are invalid on the additional ground of failing to particularly define the invention since they claim an invention other than the one disclosed in the Gibbs patent. We can of course make a fairly good guess as to what the Plaintiff meant to cover in claim 9, but the fact remains that he did not

so cover it and the claim is invalid therefor. It is axiomatic that the public is entitled to know and to be informed by the patent claims exactly what monopoly has been granted to the patentee so that the members of the public may guide themselves accordingly in avoiding infringement of said patent.

Although this obvious defect in claims 9 and 10 was presented to the trial court, it was not alluded to by the Court in its discussion, findings or opinion. This failure of the trial court to recognize that claim 9 clearly reads on an invention other than the one described in the Gibbs patent is thought to be obvious error.

II. The Issues of Infringement.

The old Fawn game upon which this suit was brought was a competitive game of the general type shown in the Gibbs patent in which a number of individual game units are arranged in a row and the individual players thereof compete against each other. When a player has made a win the games are all shut down and there can be no more winners. To this extent the old Fawn game was the same as the Gibbs game. It differed, however, from the Gibbs game in its internal construction.

The new Fawn game which was forcibly injected into this case by the Defendant changed the whole theory of play of the old game so that it was no longer competitive. Each player instead of playing against the other players now plays against a time clock. Consequently, there can be a number of winners or no winners within the allotted time set for the play. The trial court recognized this change as basic and consequently held claims 6, 7 and 8 not infringed by the new Fawn game.

THE NEW FAWN GAME DOES NOT INFRINGE.

Claim 9, to the extent that it is intelligible, is clearly a narrow version of claim 6, and calls for

“means controlled by the closing of the signal circuit of the winning unit for discontinuing the signals and opening the circuits of all the indicators on all of the units.”

The presence of this same element in claim 6 was what caused the trial court to find claim 6 not infringed by the new Fawn game. Obviously, if claim 6 is not infringed by the Defendant's omission of the above-quoted element, then the omission of the same element in claim 9 must avoid infringement of claim 9.

Claim 10 being dependent upon claim 9 is of course

Claim 3 is clearly *not* infringed by the new Fawn game, since the last element (h) of claim 3 is totally lacking. This element (h) reads as follows:

“supplementary means for indicating a winning play when all of the indicators in one of said groups have been energized.”

This *means* in the Gibbs game is either his win lamp L or his win bell 69. Since the new Fawn game does *not* have a win lamp or a win bell or any other “means for indicating a winning play when all of the indicators in one of said groups have been energized,” claim 3 on its face cannot be infringed.

The new Fawn game additionally avoids claim 3 since it has no means in addition to the indicator lamp switches for energizing the indicator lamps or maintaining them energized. In other words, the new Fawn game does not have the relays R of the Gibbs patent or any equivalent thereof.

so cover it and the claim is invalid therefor. It is axiomatic that the public is entitled to know and to be informed by the patent claims exactly what monopoly has been granted to the patentee so that the members of the public may guide themselves accordingly in avoiding infringement of said patent.

Although this obvious defect in claims 9 and 10 was presented to the trial court, it was not alluded to by the Court in its discussion, findings or opinion. This failure of the trial court to recognize that claim 9 clearly reads on an invention other than the one described in the Gibbs patent is thought to be obvious error.

II. The Issues of Infringement.

The old Fawn game upon which this suit was brought

THE NEW FAWN GAME DOES NOT INFRINGE.

Claim 9, to the extent that it is intelligible, is clearly a narrow version of claim 6, and calls for

“means controlled by the closing of the signal circuit of the winning unit for discontinuing the signals and opening the circuits of all the indicators on all of the units.”

The presence of this same element in claim 6 was what caused the trial court to find claim 6 not infringed by the new Fawn game. Obviously, if claim 6 is not infringed by the Defendant's omission of the above-quoted element, then the omission of the same element in claim 9 must avoid infringement of claim 9.

Claim 10 being dependent upon claim 9 is of course not infringed for the same reason as claim 9. In addition, claim 10 is clearly not infringed because it adds to the combination of claim 9 an

“audible signal commonly connected to all of said units, etc.”

which is totally lacking in either the new or old Fawn game. A simple reading of claim 10 shows this to be the fact.

THE OLD FAWN GAME DOES NOT INFRINGE.

If claim 3 is given a literal construction as it was by the trial court, it is not infringed by the old Fawn game since claim 3 calls for means in addition to the individual lamp switches for energizing the lamps of the annunciator. For this purpose Gibbs provided a relay for each indicator lamp. The Defendant, on the other hand, by

using a gravity switch which remains closed obviated the necessity for supplemental means as shown in the Gibbs patent and included in claim 3.

Claim 6 when construed as claiming a plurality of the game units defined in claim 3 is not infringed by the old Fawn game. Claim 7 is dependent upon claim 6 and is therefore not infringed for the same reasons. Claim 8 adds to claim 7 a main power switch manually operable by the operator at all times which is missing in the Fawn games.

Claim 9 as written is clearly not infringed by the old Fawn game since it very obviously describes a type of game different from either the Gibbs game or the Fawn game. Claim 10, being dependent upon claim 9 is of course avoided for the same reasons as claim 9 and additionally because the Defendant never employed an audible win signal in either of his Fawn games. It is difficult to see how claims 9 and 10 could be held infringed by either of the Fawn games.

THE QUESTION OF DERIVATION:

Although the matter of derivation of Defendant's game should not be an issue in this case, testimony was admitted by the Court by which Plaintiff attempted to show that (a) the Defendant copied the Loeff game; (b) that the Loeff game was copied from a Gibbs game, and therefore (c) that Defendant's game was a copy of the Gibbs game.

In the first place, the testimony fell far short of proving any of the above contentions, although the trial court seemed to think otherwise.

In the second place, the matter of derivation has nothing to do with the matter of infringement since it is a well

settled principle that any member of the general public has a perfect right to observe a patented device in operation and then to build and use a device of the same type so long as he does not come within the scope of the patent claims and does not violate a confidential relationship. To hold otherwise is to ignore the very basis of all patent law. However, the trial court went even further in this case and ruled that in determining the issue of infringement, weight should be given to the fact that the Defendant had looked at a device built by A, who had previously looked at a patented device of B, neither party seeing the operative mechanism of the former device.

There was absolutely no showing whatsoever of any breach of confidential relationship or of any use by Defendant of any trade secrets of Plaintiff or of information not available to the public at large. As a matter of fact, the evidence clearly showed that Defendant had no contact whatsoever with Mr. Gibbs, his patent or his games prior to the commencement of this lawsuit.

SUMMARY:

To recapitulate, it is Appellant's contention that:

- (1) Claims 3, 6, 7 and 8 are invalid for lack of novelty.
- (2) All of the claims in suit are invalid for lack of invention.
- (3) Claims 9 and 10 are additionally invalid for ambiguity and as claiming an invention not disclosed in the Gibbs patent.
- (4) None of the claims is infringed by the new Fawn game.
- (5) None of the claims is infringed by the old Fawn game.

ARGUMENT.

I.

The Issue of Validity.

A. THE DISCLOSURE OF THE PATENT IN SUIT.

The Gibbs game comprises a number of game units, each including a board C having 25 holes therein arranged in longitudinal and lateral rows, through each of which a ball B rolled over the board by a player may pass and be returned to the player. The annunciator panel A on each game board has 25 indicator lamps arranged in vertical and horizontal rows. The ball in passing down through any hole momentarily closes a pair of contacts to light the indicator lamp corresponding to that particular hole. Each indicator lamp and switch S has associated with it a relay R which operates to maintain its lamp circuit energized. Each relay R when energized closes through the medium of its armature R' a pair of contacts in series circuit relation with the contacts of other relays R associated with lamps in the same horizontal, vertical and diagonal group so that when five indicator lamps comprising either a horizontal, vertical or diagonal line are energized, the relays for the lamps in that group will complete a "win" circuit.

The power to the indicator lamps for each of the units extends through the contacts of a "feed" relay R2 and each unit is also provided with a "win" or holding relay R3 which is energized by the completion of any "win" circuit in that unit. The holding relay R3 when energized, simultaneously performs the following functions:

- (a) Energizes a supplementary signal lamp L on top of the annunciator panel of the winning unit;
- (b) Energizes an audible signal circuit to ring bell 69 to notify all of the players that one of the units has won;
- (c) Energizes the feed relay R2 of the winning unit to break its normal power circuit to the indicator lamps;
- (d) Completes an auxiliary power circuit to the indicator lamps on the winning unit to maintain them lighted; and
- (e) Energizes the feed relays R2 of all other game units, thereby immediately de-energizing them and stopping the game.

To re-start the Gibbs game the operator momentarily opens a main power switch to de-energize the “win” relay on the winning unit, and the players may then start the play. (For a detailed description of the Gibbs game, see Appendix, p. 1.)

B. CLAIM 3 IS INVALID.

As previously mentioned, claim 3 is a sub-combination claim covering one of the individual units employed in the Gibbs game. This claim is so broadly drawn as to be clearly invalid, and as an aid to the Court in considering the claim it is outlined in the following analysis which includes with each element the number of the corresponding part in the Gibbs drawings.

1. ANALYSIS OF CLAIM 3:

A game apparatus comprising

- (a) a board (C),
- (b) a plurality of contact devices therein (switches S, 53-54),
 - (1) adapted to be engaged by an object (ball B) moved over the board by a player,
- (c) a plurality of indicators (lamps 1-25),
- (d) *means* for electrically connecting said indicators with a source of electric current and with said contact devices (circuits from transformer 65, wires 59-61, 103, 104, 105),
- (e) said indicators and said contact devices corresponding in number and arrangement and subdivided into corresponding groups,
- (f) *means* for energizing said indicators as the associated contact devices are operated (relays R),
- (g) an electrical circuit common to all of said groups and open until all of the indicators in one of said groups have been energized (circuit including conductor 98, relay R3 and conductor 114'),
- (h) and *supplementary means* for indicating a winning play when all of the indicators in one of said groups have been energized (win light L or bell 69).

Before discussing the prior art patents attention is particularly called to the fact that claim 3 is couched in very broad language in that generous use is made of the word "means." In particular, it is to be noted that in describing the relays R the term "*means* for energizing" is used. Likewise, in defining the win lamp L and signal

bell 69 the broad term “supplementary *means* for indicating” is used. With these facts in mind and the additional fact that the trial court in order to find infringement by the Fawn games construed these claims broadly, the prior art will now be discussed.

2. CLAIM 3 IS ANTICIPATED BY NAKASHIMA:

The Nakashima Patent No. 1,678,583, Defendant's Exhibit D-1 [R. 375-381], was issued July 24, 1928, approximately two and one-half years prior to the filing of the Gibbs patent application.

Like Gibbs, Nakashima set out to create an amusement device “adapted to signal the attendant and the player when the latter succeeds in making a winning play” [R. 379, lines 4, 5, 6]. Also like Gibbs, Nakashima designed a game having a playing board provided with a plurality of apertures or pockets into which a ball could be rolled, and an annunciator panel at the rear of the board provided with a plurality of lights, each of which was connected to a contact device immediately beneath one of the apertures on the game board.

Games having *all* of these features were old and well known even before Nakashima entered the field. (See the earlier patents to Hayashi, Esmarian and Mader [R. 388, 391, 397]. Nakashima had nine lights on his annunciator arranged in three rows of three each, and nine holes in his game board with a contact device beneath each of said holes to correspond to the nine indicator lamps on the annunciator board. To increase the hazards of play he provided 21 extra holes on the game board which did not have switches or lights. Gibbs coming along several years later provided hazards in the form of raised ribs or obstacles 51 in a manner similar to that taught by Esmarian [R. 391]. However, the net effect was the

same, *i. e.*, to make it more difficult for the player to get a ball in a pay hole.

The switches used by Nakashima like those used by Gibbs comprised a pair of spring contact members 18 and 19 extending beneath the aperture so that when a ball fell upon the upper contact it would be depressed to engage the lower contact, thereby closing the circuit to its corresponding indicator lamp on the annunciator board. The nine prize-winning apertures on the Nakashima board provided with contact switches were known as star numbers and were marked with stars on the board so that the player would know what to shoot for.

Nakashima realizing the advisability of having a win signal provided supplementary signal means in the form of a bell 14 which was operated by a relay 431 when a win had been made. The coil 433 of relay 431 is in series with the indicator lamps and is so adjusted that it will not operate its armature 434 until a group of three indicator lamps are energized.

However, when the player has succeeded in energizing any group of three lamps in the Nakashima game the relay 431 will attract its armature 434, thereby causing the contact member 435 to close the circuit between 436 and 437. The adjacent coil of the relay 432 being inductively coupled with the relay winding 431, a current is induced in the secondary winding 432 which is sufficient to operate the bell 14 signifying a win.

It is thus apparent that there is absolutely no difference in over-all structure and function between the Nakashima game and one of the Gibbs game units, since each is played by rolling a ball or balls across a game board to pass the ball into an aperture therein to operate a pair of contact members which close a circuit to an annunciator

lamp corresponding to the pocket in which the ball has rolled. When any group, three in the case of Nakashima and five in the case of Gibbs, of annunciator lights has been illuminated, supplementary signal means, a bell in the case of Nakashima, or a bell and win lamp in the case of Gibbs, is energized to notify all persons of the win. In each case the win signal circuit is common to all of the groups and is inactive until all of the indicators of a group have been energized. In the case of Gibbs the energization of the indicator lamps is maintained by relays while in the case of Nakashima this energization is maintained by using a plurality of balls to maintain the switches and the lamp circuits closed.

Applying our analysis of claim 3 to the Nakashima disclosure, we find that claim 3 reads equally well on Nakashima as it does on the Gibbs game. Following through the analysis by elements we see that:

- (a) The "*board*" of claim 3 is the game board 6 of Nakashima which is provided with a plurality of apertures arranged in rows and adapted to receive a ball therein in the manner shown by Gibbs.
- (b) "*a plurality of contact devices thereon adapted to be engaged by an object moved over the board by a player*" are of course the spring fingers 18, 19 of Nakashima arranged beneath the apertures in the same manner as Gibbs, each of the contact members 19 being adapted to be depressed by a ball 10 to thereby close a circuit by engagement with contact 18.
- (c) "*a plurality of indicators*" are the lamps 12 in the annunciator panel 15 of Nakashima arranged in horizontal and vertical rows so that a win can be made horizontally, vertically or diagonally as in Gibbs.

- (d) *“means for electrically connecting said indicators with a source of electric current and with said contact devices”* are the wires shown by Nakashima in Figure 4 which connect his contact devices to their corresponding indicator lamps and a source of power.
- (e) *“said indicators and said contact devices corresponding in number and arrangement and divided into corresponding groups,”* are the indicator lamps and contact devices of Nakashima which correspond in number and are arranged in groups. The Patent Office and trial court both held that arrangement of the lights or apertures in a particular order was immaterial and a mere matter of choice. The similarity in arrangement is closer between Nakashima and Gibbs than it is between Gibbs and Faulkner.
- (f) *“means for energizing said indicators as the associated contact devices are operated”* are the plurality of balls employed by Nakashima, there being a ball for each contact device to hold the same in closed position. The “means” of this element is not restricted to the relays shown by Gibbs or qualified in any way. It covers *all means*, and therefore the employment of a separate ball to hold each switch closed, meets this broad terminology.
- (g) *“an electrical circuit common to all of said groups and open until all of the indicators in one of said groups have been energized”* is obviously the circuit of Nakashima for operating his signal bell, which includes the induction coil 432, switch 436 and terminal 437. The bell circuit is common to

all of the Nakashima groups and is operated to indicate a win only when the last of a group of lights is illuminated.

- (h) *“and supplementary means for indicating a winning play when all of the indicators in one of said groups has been energized”* is of course the bell 14 in Nakashima which is caused to ring to indicate a winning play. When the third contact switch of a group in Nakashima is closed, sufficient current passes through coil 433 to move its armature 434 to close the bell circuit.

The Nakashima patent was a file wrapper reference against Gibbs and presumptively therefore was thoroughly considered by the Examiner. As a matter of fact, the Examiner used the Nakashima reference in rejecting various claims of the application as filed, but a reading of the file wrapper shows that the Examiner did not realize how complete the Nakashima showing was. Evidently the Examiner in permitting the use of the broad term “means” in element (f) had in mind the relays R of Gibbs and it did not occur to him that this broad language could be read on Nakashima when element (f) is given a literal interpretation as the trial court has given it in this case.

As previously mentioned, Gibbs uses his switches S merely to energize the self-holding circuit of his relays R and maintains illumination of his indicator lamps by means of the relays R and their armatures R' instead of using the switches S for that purpose. If element (f) of Gibbs' claim 3 had been properly limited to “electrical” means or “relay” means for accomplishing this purpose it would not be anticipated by Nakashima. However, by inclusion of the unqualified word “means” in his element

(f) Gibbs claimed the Nakashima game as well as his own and must now bear the consequences thereof.

Claim 3 is clearly anticipated by the prior patent to Nakashima and is therefore invalid.

3. CLAIM 3 IS ALSO INVALID FOR LACK OF INVENTION:

The Prior Art Patents to Hayashi, Esmarian and Mader.

HAYASHI *No. 1,614,471* [R. 383-390] issued January 18, 1927, discloses a game of the type shown by Nakashima and Gibbs having a board with a plurality of apertures into which a rolling object may fall, and an annunciator board with a plurality of lights thereon, each light being connected to a switch immediately under one of said apertures, said apertures and indicator lamps corresponding in number and arrangement as shown in the Gibbs patent. The game is played by means of peanut-shaped objects which are rolled over the game board and fall into the apertures to illuminate the corresponding indicator lamps. The score of the winner is dependent upon which group of annunciator lamps has been energized during the play.

ESMARIAN *No. 1,612,912* [R. 390-394] issued January 4, 1927, also shows a game board with a plurality of apertures adapted to receive a ball rolling across the board. An annunciator panel is provided at the back of the game board having a plurality of indicator lamps corresponding in number to the apertures in the playing board. Each indicator lamp is connected to a pair of contacts immediately below its corresponding aperture so that when a ball drops into the aperture its corresponding indicator lamp will be energized.

MADER *No. 1,622,330* [R. 397-405] issued March 29, 1927, likewise shows a game board with a plurality of apertures therein beneath each of which is a switch comprising a pair of resilient contact members. At the rear of the game board is an annunciator panel having six rows of five lights each arranged in horizontal and vertical lines as in Gibbs, each of said indicator lamps being connected to one of the aperture switches in the game board. It will be noted that the indicator lamps and contact devices correspond in number, with each of said indicator lamps having a particular scoring value.

SCHNEIDER *No. 1,788,336* [R. 408-410] filed December 16, 1927, has a game board provided with a plurality of apertures at its rear end and a plurality of indicator lamps corresponding in number and arrangement with the apertures with the exception that the apertures are disposed in a vertical line on the inclined rear portion of the game board whereas the indicator lamps are disposed in a horizontal line thereon. Each of said apertures is provided with a movable contact immediately therebelow adapted to be engaged by a ball falling through the aperture to energize its corresponding indicator lamp. A single ball is used which returns to the player after it has actuated the switch and energized the corresponding indicator lamp.

From the foregoing it is seen that the prior art patents to Hayashi, Esmarian, and Mader all show table games having a board, a plurality of contact devices thereon adapted to be engaged by an object moved over the board by a player, a plurality of indicators, means for electrically connecting said indicators with a source of electric current and with said contact devices, said indicators and contact devices corresponding in number, and in the case of Hayashi, also in arrangement, and means for energiz-

ing said indicators as the associated contact devices are operated.

In other words, each of these prior patents satisfies elements a, b, c, d, e, and f, of claim 3, leaving only the supplementary win signal and its operative circuit called for by elements g and h of said claim. However, as previously pointed out in detail, Nakashima besides meeting elements a, b, c, d, e and f, also shows a win signal and circuits therefor which exactly meet the terms of elements f and g.

Obviously it did not involve invention to merely add the win signal of Nakashima to the games of Hayashi, Mader or Esmarian. Yet this is all that claim 3 recites.

Furthermore, the multi-unit game patents to Chester, Wallace, Higuchi, Prina and Irsch, none of which were cited by the Examiner and will be discussed in detail later, all show the use of visual and/or audible signals which function whenever an individual game unit completes a win as called for in elements (f) and (g) of claim 3.

CHESTER *No. 1,598,711* of 1926 [R. 424] shows a win light 55 [see Fig. 2, R. 424, and Figs. 9 and 10, R. 428].

WALLACE *No. 1,697,701* of 1929 [R. 436] discloses both win lights and a bell [see Fig. 10, R. 438].

HIGUCHI *No. 1,454,968* [R. 450] shows win lights 105 [see Fig. 1, R. 460].

PRINA *No. 1,518,754* [R. 470] utilizes his highest lamp 10 [see Fig. 1, R. 470] as a win light.

IRSCH *No. 1,458,844* [R. 486; see Fig. 2, R. 488] provides an annunciator panel in which there is a marker for each game unit.

Each of these patents provides an electrical circuit open until a win has been made, and "supplementary means for indicating a winning play," *i. e.*, the exact structure and circuits called for by elements (f) and (g) of claim 3.

It clearly was not invention at the time Gibbs entered the field to add the win signal circuits of the multi-unit games above discussed to the board and ball game units of Nakashima, Hayashi, Mader and Esmarian. Conversely, there was no invention in substituting the game boards and annunciator panels of Nakashima, Hayashi, Esmarian or Mader in place of the electro-mechanical devices of the multi-unit games of Chester, Wallace, Higuchi, Prina and Irsch for successively effecting a series of visible steps toward a win.

In the "board and ball type" game units of Nakashima, Hayashi, Esmarian, Mader and Gibbs, the successive steps of a player toward a win are indicated by the successive illumination of a series of lights. In the multi-unit games of Chester, Wallace, Higuchi, and Irsch the player's progress toward a win is indicated by successive positions of a movable object traveling along a race track. Obviously it was a mere matter of choice when Gibbs entered the field which method was used to indicate the player's progress, particularly in view of Prina who used the successive light method of the board and ball game units in his competitive multi-unit game.

"Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court, more than a quarter of a century ago, that unless more ingenuity and skill were required in making or applying the

said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention.”

Dunbar v. Myers, 94 U. S. 187, 191.

Furthermore, Mr. Gibbs’ own testimony shows that prior to designing the game illustrated in the patent in suit he was fully familiar with the old games of Bingo and Tango [R. 69, 77] and also with the Wallace and Higuchi games [R. 76, 147, 149-151]. As a matter of fact, Mr. Gibbs operated one of the Wallace pig games known as a “Grunt Derby” immediately prior to building his first electrified bingo game.

Consequently, we have a situation where the Plaintiff-Patentee not only had constructive knowledge of the prior art, but also had actual working knowledge thereof.

Additionally, we have the testimony of Mr. Porter [R. 172] who first laid out the wiring diagrams for Mr. Gibbs, and Mr. Cannon [R. 231] who re-designed the wiring of the Gibbs games and manufactured them for Gibbs, to the effect that no invention was involved in designing the particular electrical or mechanical structures shown in the Gibbs patent. Likewise, the Plaintiff’s expert Mr. Burke testified [R. 100-103] that it would be quite simple for him as an electrical engineer, once a person had requested him to build an electrified Bingo game, to put together any number of circuits which would accomplish this result.

Since the prior art shows, and the Examiner so held, that the broad idea of an electrified Bingo game was not patentable to Gibbs, and since out of the mouths of the Plaintiff, his witnesses and associates, comes a vehement denial that any invention whatever was required to create the structures and circuits of the Gibbs game, we come

inescapably to the conclusion that no invention whatsoever was present in the Gibbs patent.

A brief reference to the Gibbs file wrapper, Exhibit C in evidence, shows that all of the broad claims submitted by Gibbs when he filed his application to the general idea of an electrified Bingo game were rejected by the Patent Office, in which rejection Gibbs acquiesced. The only claims which were allowed by the Examiner, and the only claims therefore which can measure and define the alleged invention of Gibbs are claims which include the self-same electrical and structural features which were by the testimony of Plaintiff, his witnesses and associates merely the exercise of the ordinary mechanical and electrical skill of people working in that art.

In designing the game of his patent Gibbs merely electrified the well known game of Bingo. For the Bingo basket having a plurality of pockets into which a ball was thrown, Gibbs used a well-known game board of Nakashima and others having a plurality of pockets into which a ball was rolled. For the Bingo cards upon which the players placed markers corresponding to the numbers of the pockets into which the Bingo ball was thrown, Gibbs used the conventional annunciator panel of Nakashima and others having lights corresponding to the apertures on the game board.

The player instead of throwing a ball at a basket having pockets therein, rolled the ball into pockets on the game board, and in lieu of the player placing a marker on his numbered card the player saw a light corresponding to

that number. The rules of play were exactly the same and when one player effected a win, *i. e.*, five markers or lights in a row, the game was stopped. *How could this possibly be invention?*

As was aptly stated by Mr. Justice Bradley in *Atlantic Works v. Brady*, 107 U. S. 192, at page 200:

“The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary process of manufacture.

“Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patent monopoly which enables them to lay a heavy tax on the industry of the country, without contributing anything to the real advancement of the art. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits, and vexatious accountings for profits made in good faith.”

From the foregoing discussion it is seen therefore, that claim 3 is invalid both for lack of novelty over Nakashima, and for lack of invention.

C. CLAIM 6 IS INVALID.

Claim 6 is directed to the complete multi-unit game shown in the Gibbs patent which comprises a plurality of the individual game units defined in claim 3. It will be seen, however, that in describing the individual game units, claim 6 uses much broader terminology than claim 3 and does not limit the units to a board game as does claim 3. The broad language in the first portion of claim 6 encompasses not only board games of the type shown by Gibbs, Nakashima and others, but also the competitive game of Prina [R. 470] previously mentioned, which will shortly be discussed in detail. The balance of claim 6 obviously reads on Prina and the other multi-unit games of the prior art as will be pointed out later.

Claims 7 and 8 are dependent upon claim 6 and likewise are met by the prior art.

Analyzing claim 6, we find that it logically breaks down into elements which are identified in the Gibbs patent as follows:

1. ANALYSIS OF CLAIM 6:

A game apparatus comprising

- (a) a plurality of units (U1, U2) electrically connected together, each of said units including
 - (1) a plurality of contact devices (switches S, 53-54) and
 - (2) a plurality of indicators (lamps 1-25),
 - (3) corresponding in number and subdivided into corresponding groups,
- (b) *means* for electrically connecting the contact devices with the corresponding indicators (circuits connecting switches S with relays R and lamps 1-25),

- (c) *means* for electrically connecting said units together and with a source of electric current (wires 59, 60 and 61),
- (d) said indicators adapted to be operated when and as objects are moved by the players into engagement with the contact devices, and
- (e) *means* (relays R3 and R2) whereby when all of the indicators in any group of any one of said units have been operated to complete a winning play
 - (1) the indicators on all of the units except the winning unit will be de-energized
 - (2) while the indicators at the winning unit will remain energized for the purpose described.

As mentioned above, the first portion (a, b, d), of claim 6 merely specifies that each of the game units shall have

“a plurality of contact devices and a plurality of indicators corresponding in number and sub-divided into corresponding groups, said indicators being adapted to be operated when and as objects are moved by the players into engagement with the contact devices.”

The balance of claim 6 then specifies that these broadly described game units shall be electrically connected together and means provided whereby when a win has been accomplished the indicators on the winning unit remain illuminated and those on the competing units go dark.

If the patent Examiner handling the Gibbs application had made even a cursory examination of the prior art in the field of competitive games of the Gibbs type he would have found at least some of the multi-unit game

patents included in Defendant's Exhibit D herein, and obviously would not have allowed claim 6 and its related claims. However, the Examiner did *not cite a single multi-unit game patent* against the Gibbs claims, but allowed claim 6 and other claims directed to the entire game on the first Office action.

There is no explanation in the file wrapper or elsewhere of this obvious failure by the Examiner to properly examine the Gibbs application while it was in the Patent Office. With such careless examination on the part of the Examiner it is understandable why he did not fully appreciate the Nakashima patent as hereinbefore discussed.

As clearly shown by the patents to Prina, Chester, Higuchi, Wallace and Irsch, the broad idea of electrically interconnecting a plurality of game units in such a manner that when a win is made, the winning unit is maintained in *status quo*, a win signal is operated and the competing units disconnected, was old in the art. That this sequence of events is necessary in any competitive game operated in an amusement park is obvious.

Gibbs admitted [R. 76, 147, 149] that these three fundamentals in competitive games as shown by the Wallace Grunt Derby and the Higuchi Coney Racer were old and well known to him at the time he designed his electrified Bingo game. Each of these prior art games accomplished the above-mentioned three functions which constitute the essence of claim 6.

As will be pointed out hereinafter, claim 6 and claims 7-10 which are also directed to the complete competitive game of Gibbs are invalid for lack of invention, but before discussing this defense we will point out how Gibbs by his broad language in claim 6 overstepped the permissible

bounds of claim writing and directly covered the prior art structure shown in the Prina patent [R. 470-484].

“To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences.”

Atlantic Works v. Brady, 107 U. S. 192, 199.

2. CLAIM 6 IS ANTICIPATED BY PRINA:

The Prina Patent No. 1,518,754 [R. 470-484] which issued approximately seven years prior to the Gibbs application shows a competitive game made up of a plurality of units each operated by a separate player, the results of the players' progress being “made manifest along a visible field by means of a progressive series of lamps for each unit” [R. 477]. This is of course the same as the Gibbs game where the progress of each player is visible as the successive lamps are illuminated.

It will be noted from Figure 1 of Prina that he provides a plurality of manipulators A-J, each of which is to be operated by a separate player, which are connected to individual annunciator panels a-j. The manipulators A-J each comprises a wheel 17 [see Fig. 4] which is gear-connected to a pivoted switch arm 26 carrying a contact shoe 29 adapted to sweep up and down over a plurality of contact buttons 1a-9a, inclusive. The contact buttons 1a-9a are connected to indicator lamps 1-9, inclusive, so that as the movable contact 29 engages a contact button, its corresponding indicator lamp will be energized.

In the operation of the game the player rotates his hand wheel 17 at various speeds in order to successively energize the indicators 1-9 which will thereupon remain illuminated during the play.

After the ninth lamp is lighted, a higher speed of rotation must be obtained to cause the win lamp 10 to be lighted. When this proper speed is attained the win lamp 10 will be energized and the competing units are instantly shut down. It will be noticed that the win light 10 is on a separate auxiliary circuit which is energized after the first nine lights are illuminated in the same manner as the Gibbs win signal circuit is energized after five of his lights in a line have been illuminated.

Applying Prina to claim 6 we find that it completely meets each and every essential element thereof. To clearly show this anticipation of claim 6 by the Prina patent we will now reproduce the analysis of claim 6, in the outline form heretofore used, pointing out wherein each of the elements of this claim is met by corresponding parts of the Prina disclosure.

CLAIM 6:

A game apparatus comprising

- (a) a plurality of units electrically connected together, each of said units including
 - (1) a plurality of contact devices (Prina contact buttons 1a-9a, inc.) and
 - (2) a plurality of indicators (Prina lamps 1-9, inc.)
 - (3) corresponding in number (Prina lamps 1-9 correspond in number to his contacts 1a-9a) and
 - (4) subdivided into corresponding groups (the Prina lamps and contact devices can be subdivided into groups if desired)

- (b) means for electrically connecting the contact devices with the corresponding indicators (Prina connectors 1b-9b)
- (c) means for electrically connecting said units together with a source of electric current (Prina main leads 36, 37 and auxiliary leads 40 and 55)
- (d) said indicators adapted to be operated when and as objects are moved by the players into engagement with the contact devices (Prina indicators 1-9 are operated when shoe 29, moved by the player in response to rotation of hand wheel 17, engages the contacts 1a-9a)
- (e) means whereby when all of the indicators (Prina lamps 1-9) in any group of any one of said units have been operated to complete a winning play
 - (1) the indicators on all of the units except the winning unit will be de-energized (accomplished by breaking main line contacts 39, 52 which shuts off power to competing game units)
 - (2) while the indicators at the winning unit will remain energized for the purpose described (closing of auxiliary power circuit for winning unit to switch 53, 54 which maintains indicators 1-9 and win lamp 10 illuminated on the winning unit. [R. 479, lines 85-90]).

It is thus seen that because of the broad terminology of claim 6 the Prina patent meets each and every element thereof with the one exception that he does not subdivide his indicators into groups as mentioned in element a-4. However, as mentioned previously, the Patent Office held

and Gibbs acquiesced thereto, and the trial court so held, that it is immaterial whether the indicators be arranged in one large or in several small groups since the result, to-wit, the accomplishment of a win when a given number of lights are energized, is the same in each case.

Claim 6 then is therefore fully anticipated by the Prina patent and consequently invalid, it being remembered that there is no mention whatsoever in this claim of a game board or a ball, or apertures for the ball to pass through. In other words, Gibbs in his attempt to broadly cover his device again overstepped himself and extended his monopoly to cover the Prina game as well as his own. As is so often stated, "That which infringes if later, anticipates if earlier" (*Miller v. Eagle*, 151 U. S. 186), and since Prina would infringe Gibbs' claim 6, it being prior in time, invalidates claim 6.

3. CLAIM 6 IS ALSO INVALID FOR LACK OF INVENTION:

Referring back to our analysis of claim 6, it will be seen that elements a, b and d thereof specify that the individual units shall include

"a plurality of contact devices and a plurality of indicators corresponding in number and subdivided into corresponding groups, means for electrically connecting the contact devices with the corresponding indicators, * * * said indicators adapted to be operated when and as objects are moved by the players into engagement with the contact devices."

This portion of claim 3 even if narrowly construed by reading into it words which are not there, describes the board and ball games of Nakashima, Hayashi, Esmarian and Mader, since each of these prior patents discloses a game board having a plurality of apertures and contact

devices therein and a plurality of indicators corresponding to said contact devices, electrically connected thereto and adapted to be operated when a ball is moved by the player into engagement with said contact devices.

Obviously then, the first half of claim 6 was old in the art when Gibbs entered the field and if the claim is to be allowable we must look elsewhere for novelty therein.

Element (c) of course adds nothing novel to the combination since it merely re-recites part of element (a), to-wit, "means for electrically connecting the units together and with a source of power." This leaves only element (e) as a possible source of novelty.

Examining element (e) we find that it recites:

"means whereby when all of the indicators in any group of any one of said units have been operated to complete a winning play the indicators on all of the units except the winning unit will be de-energized while the indicators at the winning unit will remain energized."

It will be recognized that the foregoing is rather broad language, and as hereinbefore stated, reads directly on the prior art patents now to be discussed.

CHESTER *Patent No. 1,598,711* [R. 423-434] issued in 1926 shows a competitive game made up of a plurality of electrically interconnected units, each operated by an individual player by means of a wheel 19 to advance a pair of dancers 31 around a circular track. When the dancers reach their goal they close a win switch 30 which operates relay 53 to energize relay 62 in the main line to cut off power to the non-winning game units. The operation of relay 53 also closes the circuit to a win

lamp 55 and sets up a transfer circuit to maintain said lamp energized after the win is made and the competing units are disconnected. It is thus seen that the patent to Chester fully and completely meets all of the terms of elements (c) and (e) of Gibbs' claim 6.

WALLACE *Patent No. 1,697,701* [R. 434-447] issued in 1929 covers the apparatus referred to by Mr. Gibbs in his testimony as the "Grunt Derby." In this game a number of parallel race tracks are provided, each with a moving object in the form of a pig and a little boy. The players are each provided with an individual playing board (as in Gibbs) over which the player rolls a ball to make it pass through one of the apertures at the rear of the board. A switch is disposed under these apertures so that the ball in passing through any one of them closes the switch to complete a circuit to an electric motor which advances the pig a short distance up its particular track.

The object of the game is to get one of the pigs to traverse the path to the winning position, and when the pig has arrived at its goal a win lamp circuit is closed showing which unit has won and at the same time operates a power relay to cut off the power to the other games. It is to be noted that in addition to clearly meeting elements c and e of claim 6 that Wallace additionally shows a board and ball game of the Gibbs type.

HIGUCHI *Patent No. 1,454,968* [R. 450-467] illustrates the Coney Racer with which Mr. Gibbs was familiar at the time he designed his game. Higuchi had a racing game quite similar to that of Wallace except that it employs rabbits instead of pigs, as seen best in Fig. 1 [R. 460]. Each player was provided with a manually operated catapult device for throwing a ball so that it would

engage electrical contacts which would in turn operate a motor to advance the player's rabbit a certain distance up the race track. When a win is made a win lamp 105 is energized and the other games are de-energized. Here again we find a competitive prior game which completely meets the terms of elements c and e of Gibbs' claim 6.

IRSCH *Patent No. 1,458,884* [R. 486-494] shows another competitive game wherein a plurality of individual game units are electrically connected together, each provided with a duck that travels along a path as the operator rotates a wheel 68. An annunciator panel 2 is provided to indicate a win when a player causes his duck to travel the full length of the track and deposit an egg into a cup 24. The weight of the egg depresses spring contact 26 causing it to engage stationary contact 27 to close the annunciator circuit for that particular game, thus announcing the fact of the win. Completion of a win by one player disconnects through movement of main switch 59 all of the competing games, which again satisfies the terms of elements c and e of claim 6.

It is not difficult to see how Mr. Gibbs, who at the time of making his alleged invention was operating one of the Wallace Grunt Derbys, should progress from the Grunt Derby to the electrified Bingo game disclosed in his patent. Being familiar with the popular game of Bingo, his natural approach to the problem was to duplicate the conventional Bingo basket and card on the game board and annunciator panel respectively, of the Nakashima, Hayaishi, Esmarian and Mader games, thereby producing his single game unit; and then to hook up his units as in the Wallace game which he was then operating, or the Higuichi game with which he was familiar. Certainly these thought processes and actions did not rise to the dignity

of invention and did not justify the grant of patent monopoly.

Plaintiff's expert and associates testified that once this general concept was given to anyone skilled in the art the particular mechanism and circuits for accomplishing the same amounted to nothing but ordinary skill which any technician could supply. For example, the game units could be connected in the manner taught by Prina or Chester which is the system followed by the defendant, or they could be connected as shown by Wallace or Higuchi with which Gibbs was familiar.

As the Supreme Court said in the case of *Standard Brands v. National Grain*, 308 U. S. 34:

"His process is the result of the exercise of the skill of the calling, the application of an old principle to a similar or analogous subject with no change in the manner of application and without any substantially different result."

D. CLAIMS 7 AND 8 ARE INVALID.

1. CLAIM 7 IS ANTICIPATED BY PRINA AND VOID FOR LACK OF INVENTION:

Claim 7 is dependent upon claim 6, merely adding thereto

"an independent supplementary signal at each of said units for signalling a winning play to the players."

which in the Gibbs game is the win light L or the bell 69.

It is at once apparent therefore that claim 7 is also anticipated by Prina since the win light 10 of Prina is identical with the win light L of Gibbs. Since Prina anticipates claim 6 it also therefore anticipates claim 7.

Furthermore, the game of Nakashima has a supplementary win signal, to-wit, his bell 14, and similar win

signals are shown in the multi-unit game patents such, for example, as the win lights 55 of Chester, the lamps 67 of Wallace, the win lamps 105 of Higuchi, and the annunciator windows of Irsch. Consequently, claim 7 is also invalid for lack of invention since it adds nothing to claim 6 not shown by the same prior patents which invalidate claim 6.

2. CLAIM 8 IS ANTICIPATED BY PRINA AND VOID FOR LACK OF INVENTION:

This claim also depends upon claim 6 and must stand or fall with claim 6 for the same reasons ascribed to claim 7:

Claim 8 merely adds to claim 6 the limitation found in claim 7, to-wit,

“an independent supplementary signal for signalling a win”

and in addition thereto

“means under the control of the operator for opening and closing the circuits of all the units simultaneously at will.”

This latter element is the main switch 68 in the Gibbs patent.

Such means are present in the patents to Chester (switch 71), Wallace (switch 64), Higuchi (switch 74) and Irsch (switch 59) and are inherent in the Prina game as illustrated. Obviously it would not be invention to add a main circuit switch to any electrical apparatus, and claim 8 like claims 6 and 7 is anticipated by Prina and is additionally void for lack of invention over the other patents cited.

E. CLAIMS 9 AND 10 ARE INVALID.

1. CLAIMS 9 AND 10 CLAIM AN INVENTION OTHER THAN THE ONE DISCLOSED:

To facilitate consideration of claim 9 it is reproduced here in outline form as follows:

ANALYSIS OF CLAIM 9:

A game apparatus comprising

- (a) a plurality of electrically connected units each including
 - (1) a game board (C) with a plurality of apertures therein (26-50) and
 - (2) an annunciator (A) with a plurality of indicators thereon (lamps 1-25),
- (b) electrical contacts (switches S) adjacent each of said apertures connected in the circuits of said indicators,
- (c) said indicators and said apertures corresponding in number and subdivided into corresponding groups
 - (1) whereby when objects are deposited in said apertures by the players at the several units, corresponding indicators will be energized.
- (d) a supplementary signal circuit on each of said units (conductors 109-110 to win lamp L)
- (e) and *means* for holding said signal circuit open until all of the indicators of any group on *each* of said units have been energized
- (f) and for closing said signal circuit when *all* of the indicators of any *unit* have been energized
- (g) and *means* controlled by the closing of the signal circuit of the winning unit for discontinuing the signals and opening the circuits of the indicators on all other units.

From the above outline it is readily apparent that claim 9 is ambiguous and indefinite in reciting a game apparatus not disclosed in the Gibbs patent. In elements e and f above the claim recites

“*means* for holding said signal circuit open until all of the indicators of any group on *each* of said units have been energized and for closing said signal circuit when *all* of the indicators of any *unit* have been energized.”

In the Gibbs game as disclosed in the specification, the supplementary signal circuit is closed when all of the indicators in any *group* of any *one* unit are energized, *i. e.*, the win circuit is closed as soon as any *group* of five lights in a row on any of the game units is energized. There is no showing whatsoever in the Gibbs specification of means for holding the signal circuit open until a group on *each* unit is energized, nor of means for closing the signal circuit when *all* the indicators of a *unit* have been energized. Consequently claim 9 is void as claiming an invention not disclosed in the specification.

Furthermore, elements e and f are inconsistent with each other since element (e) provides means for holding the signal circuit open until all of the indicators in any *group on each* of the units is energized, whereas element (f) provides for closing said circuit when *all* of the indicators of any *unit* have been energized. Since elements (e) and (f) are both talking about the same circuit it is obvious that one of them is wrong—the circuit can't meet *both* requirements. As a matter of fact, both elements are wrong as previously mentioned.

Claim 10, being dependent upon claim 9 is likewise invalid for the ambiguities set forth in claim 9 and as not claiming the invention described in the Gibbs patent.

2. CLAIMS 9 AND 10 ARE INVALID FOR LACK OF INVENTION :

Claim 9 is a somewhat narrower version of claim 6 and is not only void for claiming an invention other than that disclosed in the specification, but is also invalid for lack of invention over the prior art patents heretofore discussed.

Elements a, b and c of claim 9 describe a single Gibbs unit in practically the same language as used in elements a, b and d of claim 6 except that the unit is described as one employing a game board with a plurality of apertures into which objects may be deposited to operate the electrical contacts. The balance of claim 9, to-wit, elements d, e, f and g, *attempt* to describe the same subject matter as the last half of claims 6 and 7, but in somewhat different language.

As was the case with claim 6, the first portion of claim 9 reads squarely on the board and ball game patents of Nakashima, Hayashi, Esmarian and Mader with the one exception that the indicators and apertures are stated as being subdivided into groups. However, as previously mentioned, the original claims of the Gibbs application which were directed to this feature were all rejected by the Examiner on the ground that "no invention would be involved in connecting certain groups of holes 14 in Esmarian with a master signal in view of Nakashima."

The acquiescence of Gibbs to this rejection by the Examiner of claims directed to the feature of subdividing the apertures and lights into groups now estops the Defendant from urging that this element contributes anything to the patentability of the claim.

Each of the prior art patents, Nakashima, Hayashi, Esmarian and Mader, discloses a game apparatus com-

prising an electrical unit including a game board with a plurality of apertures therein, an annunciator having a corresponding number of indicators, and electrical contacts adjacent each of said apertures connected in the circuits of said indicators, whereby when objects are deposited in said apertures by the players at the several units, corresponding indicators will be energized.

The last half of claim 9 (elements d, e, f and g) to the extent that it is intelligible describes, as does the last half of claims 6 and 7, the circuits connecting the individual game units together so that when there is a win, a win light on the winning game will be illuminated and the competing units will be disconnected.

This last portion of claim 9 is even more clearly met by the multi-unit game patents to Prina, Chester, Wallace, Higuchi and Irsch than was claim 6, each of which shows a "supplementary signal circuit" which when closed "discontinues" the competing game units.

In summary, then, it is apparent that claim 9 like claim 6 is unpatentable over any one of the patents to Nakashima, Hayashi, Esmarian or Mader in view of any one of the competitive game patents to Prina, Chester, Wallace, Higuchi or Irsch. By simply combining any one of the first group with any one of the second group, the entire Gibbs construction of claim 9 is obtained. Hence claim 9 is void for lack of invention.

As was said by this Court in the case of *Ray v. Bunting Ironworks*, 4 F. (2d) 214,

"The selection and putting together of the most desirable parts of different machines in the same or kindred art, making a new machine, but in which each part operates the same way as operated before and effects the same result cannot be invention."

Claim 10 is dependent upon claim 9 and merely adds to claim 9 the limitation of

“an audible signal commonly connected with all of said units and adapted to be operated upon the closing of the supplementary signal circuit of any of said units.”

The addition of this element does not help the validity of the claim in the slightest since such an audible signal is shown in the same prior art patents which invalidate claim 9.

An audible signal is found in the Nakashima, Wallace and Mader patents, and furthermore, it could not possibly amount to invention to merely substitute an audible signal for a visual signal in the other prior art games where the two are admittedly equivalent.

Consequently, it is apparent that claim 10 must fall with claim 9,

- (1) because being dependent on claim 9 it is ambiguous and describes an invention other than the one shown in the Gibbs patent, and
- (2) because its addition to claim 9 cannot lend patentability to an otherwise invalid claim.

The Supreme Court in *Powers Kennedy Co. v. Concrete Company*, 282 U. S. 175, stated the situation with respect to claim 10 very succinctly as follows:

“Neither the combination of old elements or devices accomplishing no more than an aggregation of old results nor the use of an old apparatus or appliance for a new purpose is invention.”

II.

The Issues of Infringement.

A. CONSTRUCTION AND OPERATION OF THE OLD FAWN GAME.

The old Fawn game is described in detail commencing at page 5 of the Appendix and we will only point out here the essential parts thereof necessary for our consideration of the issues of infringement.

The old Fawn game [see photographs, R. 325-341] comprised a number of game units, each to be played by a separate player, each unit including a game board over which a player repeatedly projected a ball. The game board had 24 holes through which the ball could pass, the holes being arranged in two lateral rows of 12 holes each. The ball in passing through any of the holes on its way to be returned to the player for additional play operated a paddle, one of which was located beneath each hole. Each paddle was part of a switch in circuit with an indicator light on an annunciator panel for that unit. The paddles were balanced so that once depressed by the ball falling thereon they stayed depressed to keep the switch closed and their corresponding indicator lamp lit. The panel included 25 lamps arranged in vertical and horizontal rows in the same manner as shown in the Gibbs patent.

Each of the paddles when depressed by the passage of the ball released a pin on one of a series of wheels beneath the game board, the wheels having additional pins engaging "win" bars so that when all of the paddles for any horizontal, vertical, or diagonal group of indicator lamps had been depressed, the vertical "win" bar, the horizontal "win" bar, or the diagonal "win" bar would be moved by

the wheels causing a mercury switch carried by another bar to close a separate "win" circuit.

The completion of the "win" circuit energized a "win" relay which (a) energized a supplementary signal lamp on top of the annunciator panel; (b) disconnected the normal power circuit supplying power to the indicator lamps of the winning unit; (c) closed an auxiliary power circuit to the indicator lamps on the winning unit; and (d) actuated a main power relay to disconnect the supply of power to all of the other units, thus stopping the game.

The game was re-started by the operator actuating a restart lever common to all of the units which lifted all of the paddles back to their pin engaging position and opened the indicator lamps' circuits which had been closed by the depressed paddles. This action also opened the mercury switch, de-energizing the "win" relay and allowing the main power switch to re-close.

This game had no audible signal corresponding to the Gibbs audible signal 69. Likewise, it did not have individual lamp relays or any means other than the paddle switches for maintaining the indicators energized.

B. CONSTRUCTION AND OPERATION OF NEW FAWN GAME.

The new Fawn game includes the same structural and mechanical units including game boards, annunciator panels, the paddles beneath the holes in the game boards, the pin and wheel mechanisms for controlling the mercury switches, and the mechanism for resetting the paddles when a game is to be restarted, as were present in the original Fawn game.

However, the *supplementary signal light* on each of the unit annunciator panels has been eliminated.

Also the circuits have been changed so that the new Fawn game is *not* competitive as was the old game. The operation of the “win” relay on any unit does *not* shut down the other game units but on the contrary all of the units remain energized even though the “win” relay on one or more of the units is actuated.

The stopping of the game is controlled solely by a time clock. The clock is started at the beginning of a game when the operator actuates the restart lever and the game continues for the time period for which the clock is set. At the end of the predetermined time the clock opens the main power switch, stopping the game and stopping the clock until it is restarted by the operator of the games. Since the completion of a winning row of indicator lights on one unit does not stop the game, the other players continue the play until the end of the clock time period, thereby making it possible to have several winners. The lights are extinguished only at the end of the time period.

In the altered Fawn game there is *no* audible signal corresponding to the Gibbs audible signal bell 69, and of course *no* win lamp L. (For a detailed description of the new Fawn game see Appendix, p. 10.)

C. THE NEW FAWN GAME DOES NOT INFRINGE.

1. CLAIMS 9 AND 10 ARE NOT INFRINGED BY THE NEW GAME:

As has been pointed out heretofore, claims 9 and 10 to the extent that they are intelligible are directed to the same subject matter as claims 6 and 7, being merely narrower versions thereof. Since the trial court held that the new Fawn game did *not* infringe broad claims 6 and 7, it is obvious error for the court to have held *narrow* claims 9 and 10 infringed by the new Fawn game. In this connec-

tion it is interesting to note that Plaintiff neglected to present any findings to try and substantiate this erroneous ruling of the Court. Nor is any hint given in the Court's opinion. We are left completely in the dark on the subject.

It is axiomatic that if a *broad claim is not infringed* by an accused structure, then *narrower versions* of that claim *cannot possibly* be infringed.

This elementary rule of patent law was finally recognized by the trial court when after having first found broad claim 6 not infringed but its *dependent* claims 7 and 8 infringed, the Court reversed itself and conceded that claims 7 and 8 also were not infringed. This ruling is found on pages 288 and 289 of the Record as follows:

“Mr. Fulwider: In view of the fact that claims 7 and 8 depend directly on 6, is it your Honor's intention to hold them infringed, whereas the broader claims would not infringe?

The Court: Only to that extent.

Mr. Fulwider: My thought was if claim 6, the broad claim, is not infringed, then claims 7 and 8, the narrow claims, *could* not be infringed. . . .

The Court (to Mr. Huebner): What is your view about that? I think they *probably* fell with it. I think Mr. Fulwider is right.

Mr. Huebner: I think the point he makes is correct, so far as the application of the rules go.

The Court: I will eliminate 7 and 8, because they are dependent on 6.”

Even a cursory reading of claim 9 shows that it, like claim 7, is merely a narrow version of claim 6. This fact was ignored by the trial court and evaded by counsel

for Plaintiff as appears on page 289 of the Record as follows:

“Mr. Fulwider: May I ask a question of Mr. Huebner along that line: Isn’t it true also, Mr. Huebner that 9 and 10, although written independently are narrower than claim 6, and are directed to the same subject matter?

Mr. Huebner: I decline to answer that.

The Court: I think we will let them stand. The chief claim we are interested in is claim 3.”

Since there are no Findings to substantiate the trial court’s ruling that the new Fawn game infringed claims 9 and 10 we must refer to the Court’s discussion with Plaintiff’s counsel during his final argument and the Court’s opinion to try and find the answer to this anomaly.

As is apparent from said discussion and the Court’s opinion, *the Court held* that the Defendant by *changing* the old Fawn game to a *non-competitive game* removed the game from the scope of claim 6. See R. 262, where the Court stated with respect to the *new* Fawn game as follows:

“The Court (to Mr. Huebner): * * * That is the fundamental distinction, that while there is a possibility that several persons may win, and also the possibility that no one might win in his (Faulkner’s) game, while your game goes on until somebody wins. So here are two differences in result. His games stop automatically after a minute and a half. Your game goes on until somebody wins.”

This thought was further stated by the trial court at R. 267 as follows:

“The Court: * * * Therefore the second elements of claim 6 are not in the altered Fawn game.”

In the Court's opinion we find a further statement to the same effect at R. 287 as follows:

"The Court: * * * The (new) Fawn game is played for a definite time,—a minute and a half, making it possible for two persons to win during the course of the game, one after the other. * * *

The result is that under the (new) Fawn game there can be any number of winners, and it is possible that no one should win, during that time, while under the Gibbs game only one player may win and there is always a winner, because the game does not stop until one person has won. In the other game, as I have already stated, the time clock automatically stops all games, * * *

* * * *I do not think that claim 6 is infringed, and I think if you read them the way counsel desires me to read them, they would fall under the interdict of the recent decision of the Supreme Court in Halliburton v. Walker."*

The foregoing and like rulings by the Court were embodied in Alternate Findings XIX, XX and XXIV proposed by Defendant [R. 27, 28, 39] but for some reason were not adopted by the Court, although the Decree of course in effect finds no infringement of claims 6, 7 and 8.

The elements of claim 6 which the Court referred to as being absent in the new Fawn game are those set forth as element (e) in the analysis of claim 6 outlined earlier in this Brief. Element (e) reads as follows:

- (e) “means whereby when all of the indicators in any group of any one of said units have been operated to complete a winning play
 - (1) the indicators on all of the units except the winning unit will be de-energized
 - (2) while the indicators at the winning unit will remain energized for the purpose described”.

Element (e) of claim 6 obviously refers to the relays R2 and R3 in the Gibbs structure which, as soon as a winning play has been made, disconnect the competing games while effecting a power transfer to an auxiliary circuit in the winning game so that its lights will remain energized. The win circuit of which R3 is a part also energizes an independent supplementary signal, to-wit, the win lamp on top of the winning game, which is what claim 7 adds to its parent claim 6.

Referring to claim 9, we see that this same structure, to-wit, the win circuit and relay R3 is described in elements d, e, f and g as follows:

- (d) a supplementary signal circuit on each of said units
- (e) and *means* for holding said signal circuit open until all of the indicators on any group on each of said units have been energized
- (f) and for closing said signal circuit when all of the indicators of any unit have been energized
- (g) and *means controlled by* the closing of the signal circuit of the winning unit for *discontinuing* the signals and opening the circuit of the indicators on all other units.

The “supplementary signal circuit” of element (d) is obviously the circuit for the win lamp L, but in order to have the rest of the claim make any sense it must be assumed that Gibbs means to also include in his “supplementary signal circuit” his win circuit and relay R3 which are in parallel with the win lamp circuit. With this interpretation given to element (d), element (g) makes sense. Otherwise, it is unintelligible.

Element (g) of claim 9 covers exactly the same subject matter as set forth in element (e-1) of claim 6, *i.e.*, that when a win is accomplished *the lights of the non-winning games will be disconnected*. This is the element in claim 6 that the trial court found lacking in the new Fawn game. It follows as a matter of course therefore under the trial court’s own reasoning and ruling that claim 9 is not infringed for the same reasons that claim 6 is not infringed. The lower court was clearly in error in not so holding.

Since *claim 10* is dependent upon claim 9, and since claim 9 is not infringed, therefore, claim 10 *cannot possibly* be infringed.

Additionally, claim 10 is obviously not infringed because there is no “*audible signal commonly connected with all of said units*” to be found in the new Fawn game. The evidence on this point is uncontroverted.

It is therefore seen that claims 9 and 10 by a simple reading thereof and comparison with claim 6 cannot be infringed, since claim 6 was held by the lower court *not* to be infringed.

2. CLAIM 3 IS NOT INFRINGED BY THE NEW FAWN GAME:

Here again the trial court apparently ignored the plain wording of the claim in ruling that claim 3 was infringed by the new Fawn game. There is nothing in the Court's opinion or in the Findings of Fact to indicate why the Court made this ruling so we can only guess as to the Court's reasons therefor. The lack of Findings is of course understandable since Plaintiff could not frame a finding which would back up the Court's ruling.

The only reference in the Findings to the construction and operation of the new Fawn game appears in the latter portion of Finding No. 12 [R. 37] which compares the new Fawn game to the old game and states that the new game is illustrated in Exhibit 9. Nowhere in this or any other finding is there any foundation for the Court's ruling that the new Fawn game infringed claim 3.

On the contrary, Finding No. 12 [R. 37] in the sentence commencing with the last word in line 20 lays a foundation for a ruling that the new Fawn game does *not* infringe claim 3. In this sentence it is stated that:

“certain electric globes at the top of each unit of said game were removed.”

What the Finding neglected to say, however, and which of course it could not say since it was supposed to support the Decree, was that these “certain electric globes” which were removed *were the win lights 22* of the old Fawn game. Finding No. 12 *should* have said directly what it evasively said by inference, to-wit, that the new Fawn game has *no win lamp or other means for signalling a win*, as required by the last element of claim 3.

It should not be necessary to elaborate on the above self-evident fact, but since the Plaintiff may pursue on this Appeal some of the tenuous theories advanced by him at the trial, we will take a few moments to thoroughly document our position that element (h) is totally lacking in the new Fawn game. For this purpose claim 3 is here reproduced with elements g and h separately set forth as follows:

Claim 3:

A game apparatus comprising a board, a plurality of contact devices thereon adapted to be engaged by an object moved over the board by a player, a plurality of indicators, means for electrically connecting said indicators with a source of electric current and with said contact devices, said indicators and said contact devices corresponding in number and arrangement and sub-divided into corresponding groups, means for energizing said indicators as the associated contact devices are operated,

(g) an electrical circuit common to all of said groups and open until all of the indicators in one of said groups have been energized

(h) and *supplementary* means for *indicating* a winning play when all of the indicators in one of said groups have been energized.

There is no question but that in the Gibbs game the electrical circuit referred to in element (g) above is the

win circuit which includes the holding relay R3, and that the “supplementary means for indicating a winning play” of element (h) is either the win light L or the bell 69. This was not disputed by the Plaintiff at the trial. That it could not have been disputed is shown by reference to the Gibbs specification wherein we find element (h) of claim 3, to-wit, “supplementary means for indicating a winning play” (win lamp L or bell 69) mentioned several times as follows:

“additional signal for such
winning play” p. 1, line 9 [R. 303]

“supplementary audible and
visible signal will indicate
the winning play” p. 1, line 68 [R. 303]

“a supplementary indicator
lamp L which is adapted to
be energized only when the
circuit of any one of the
groups of contacts S has
been closed” p. 2, line 78 [R. 304]

“the master indicator L on
each unit * * * will glow to
indicate a winning play” p. 4, line 54 [R. 306]

“thus the bell will ring,
signalling the house oper-
ator who will locate the win-
ning play by its glowing
lamp L” p. 4, line 125 [R. 306]

The win lamp L and signal bell 69 of Gibbs are described in the claims with varying terminology as follows:

Claim 2 refers to a “master signal”

Claim 3 refers to “supplementary means for indicating a winning play”

Claim 5 recites “a signal”

Claims 7 and 8 recite “independent supplementary signal”

Claim 9 recites a “supplementary signal”

Claim 10 has both “supplementary signal” and an “audible signal.”

It is clearly apparent therefore that the “supplementary means for indicating a winning play” called for by the last element of claim 3 must be the full equivalent in structure and function of the win lamp or win bell of Gibbs, and *in addition* must be *supplementary* to the other structure of the claim.

In the new Fawn game there is no win light, win bell, or any other supplementary means for indicating a winning play. Therefore, it follows as a matter of law, applying the well-known doctrine that omission of an element avoids infringement, that the new Fawn game cannot possibly infringe claim 3.

In addition to the reasons above set forth for the non-infringement of claim 3 by the new Fawn game, it is submitted that the new Fawn game further avoids infringement of claim 3 because it omits elements (f) and (g) thereof. However, since the structure alleged by Plaintiff to meet elements (f) and (g) of claim 3 is the

same in both the old and the new Fawn games and since the omission from the new game of the win signal (element h) so clearly avoids infringement of claim 3, a discussion of this additional defense will be deferred until the issue raised by the old Fawn game is treated.

We will first examine the theories advanced at the trial by the Plaintiff concerning the win signal which apparently were sufficiently successful in confusing the issue to cause the trial court to commit error.

3. PLAINTIFF'S THEORIES OF INFRINGEMENT BY THE NEW GAME:

It will be remembered that the *new* Fawn game is in this case *solely at the insistence of Defendant* who was forced to file Interrogatories [R. 5] (to which Plaintiff objected) and a Counterclaim for declaratory relief [R. 12, 13] in order to get the new Fawn game before the trial court.

The Defendant's position then was, and still is, that since he had *never* employed a "win bell," and had *eliminated* his former "win lamp" that *non-infringement* of claim 3 by his new game was so apparent as to make the entry of a decree to this effect merely a routine matter. Obviously he no longer had anything in his Fawn game which responded to the wording:

"supplementary means for indicating a winning play when all of the indicators in one of said groups have been energized." (found in element h of claim 3)

However, Defendant underestimated the tenacity of Plaintiff, who instead of admitting that "white is white" came up with two separate theories to prove that "white is black."

Each of Plaintiff's theories was based on the old expedient of trying to use the same piece of structure several times to thereby meet a number of elements of the claim. This practice is a customary expedient of desperation and has been consistently condemned by the courts. However, even with this false premise, the Plaintiff was not able to build a theory of infringement that meets the plain terms of the claim.

The Plaintiff in casting about for something in the new Fawn game which might somehow be said to be an equivalent of the win lamp or bell of element (h) theorized that since the annunciator lamps in the new Fawn game remained illuminated after the timer had shut down the game, that the circuit which accomplished this could be called the "supplementary means for indicating a winning play."

This argument is obviously fallacious on its face. In the first place the circuit that keeps the annunciator lamps lit does not "indicate" anything, and secondly it is not a "supplementary" means, since it is the self-same circuit alleged by Plaintiff earlier in the claim to meet the terms of element (g). The Plaintiff has not as yet offered to explain just how this circuit of element (g) can be "supplementary" to itself so as to also satisfy element (h). To say that this circuit is the equivalent to the Gibbs signal lamp and bell is to ignore the plain and simple wording of the claim.

The second novel theory propounded by Plaintiff was that because the relay which transferred the power circuit in the winning game made a slight click and caused a momentary flicker of the indicator lights it should be called the supplementary signal means of claim 3. This

argument is of course equally fallacious since the click of the relay and the flicker of the lights is merely an incident of using cheap relays, as admitted by Plaintiff's expert [R. 141-142]. In the first place, the click and flicker do not "indicate" anything to anyone but the individual player, and to him only if he is listening carefully, has been informed that he may expect a click, and is looking at his annunciator at the exact instant he makes a win. Secondly, the relay that is guilty of the click has no function of indicating a win, and if it weren't a cheap variety would not make a click or cause a flicker. Thirdly, even if the click and flicker could be said to be the equivalent of the Gibbs win lamp and bell, the relay causing them is not "supplementary" to the circuit previously claimed, since the relay is the essential part of the circuit previously alleged by plaintiff to meet the terms of element (g).

During the course of the trial the Plaintiff seemed to amalgamate these theories and by the time the trial was over was urging that he found the equivalent of the Gibbs win lamp and bell of element (h) in the transfer relay of the new Fawn game because (1) it was instrumental in keeping the indicator lamps lit as claimed in element (g); (2) because it made a click, and (3) because it caused a momentary flicker in the indicator lamps when their circuit was transferred. Whether or not Plaintiff contends that it takes one or two or all of these factors to make the relay circuit alleged by Plaintiff to meet element (g) become the win lamp and bell of element (h) is not apparent.

In any event, it is submitted that it was clearly error on the part of the trial court to follow these theories of Plaintiff, if they were followed. It is not believed that this court will be similarly misled by such evasive tactics.

D. The Old Fawn Game Does Not Infringe.

Briefly reviewing the construction of the old Fawn game it will be remembered that it comprised a number of game units, each unit comprising a board over which the player repeatedly projected a ball with a catapult. The game board had 24 holes through which the ball could pass, the holes being arranged in two transverse rows of 12 holes each. The ball in passing through any of the holes operated a paddle, one of which was located beneath each hole. Each paddle was part of a switch in an electrical circuit to an indicator light on an annunciator panel for that unit which had 25 lamps arranged in vertical and horizontal rows. The construction of the old Fawn game playing board and annunciator is best seen by the photographs [R. 325, 327 and 329].

Each of the paddles when depressed by the passage of a ball through its aperture released a pin on one of a series of wheels beneath the game board and stayed depressed. Win bars were provided so that when all of the paddles corresponding to any horizontal, vertical or diagonal group of indicator lamps had been depressed, the appropriate win bar would be moved by the wheels, thereby tipping a mercury switch to complete a win circuit which was not connected, *i. e.*, not common, to the lamp circuits. The paddles and other mechanical features of the Fawn game are best seen in the photographs [R. 331-337] and Defendant's colored drawing [R. 527].

The closing of the separate win circuit by mechanically tilting the mercury switch energized a win relay which performed the following functions:

- (a) energized a supplementary signal lamp on top of the annunciator panel;
- (b) disconnected the normal power circuit to the indicator lamps of the winning unit;
- (c) closed an auxiliary power circuit to the indicator lamps on the winning unit, and
- (d) opened the main power switch to disconnect all of the other units, thus stopping the game.

The game was re-started by a re-start lever common to all of the units which lifted all of the paddles back to their pin-engaging position and opened the indicator lamp circuits which had been closed by the depressed paddles. This action also opened the mercury switch, de-energizing the win relay and allowed the main power switch to re-close.

The old Fawn game had no audible signal corresponding to the Gibbs bell 69. Likewise, it did not have any relays R for maintaining the lamps energized. The wiring of the old game is best seen in the wiring diagram [R. 341].

1. CLAIM 3 IS NOT INFRINGED BY THE OLD GAME.

The first and most obvious difference between the old Fawn game and the Gibbs game as defined in claim 3 is the fact that the Fawn game does not include element (f) which recites:

“means for energizing said indicators as the associated contact devices are operated.”

In the game disclosed in the Gibbs specification and described by claim 3 the structure corresponding to the parts of the above element (f) are as follows:

- (1) The “means for energizing” are the relays R and their armature R’.
- (2) “said indicators” are the lamps 1-25, inc.
- (3) The “associated contact devices” are the switches S comprising resilient contacts 53 and 54.

In the Gibbs game when the contacts 53, 54 are momentarily closed by a ball passing through the aperture, they energize the relay R which pulls down its armature R’ which in turn sets up a holding circuit to keep relay R energized to thereby maintain illumination of the lamps 1-25. Since the contacts, 53, 54 are only closed momentarily, it is of course necessary for Gibbs to provide *additional* means, to-wit, the relay R, for maintaining his indicator lamp energized.

In games of this type there are essentially two ways of maintaining the indicator lamps energized. The first and most obvious way is that taught by Nakashima and others in the prior art who keep their contact devices closed throughout the play. No separate or additional means is thus needed to maintain energization of the annunciator lamps.

Another and more complicated way of keeping the annunciator lamps illuminated is to use a switch that only closes momentarily and then to provide separate holding means in the lamp circuit to maintain the lamps energized.

Element (f) above quoted accurately describes the momentarily closed switch and relay method used by

Gibbs for energizing his annunciator lamps and keeping them energized.

From an examination of the Fawn game structure it is seen that the Defendant has adopted the system of Nakashima for energizing his lamps rather than the system of Gibbs. In other words, in Defendant's Fawn game the contacts 51 and 58 remain closed throughout the play, thus obviating the need for additional holding means such as the Gibbs relays R described by element (f) in claim 3. The Defendant has improved the Nakashima system by balancing his paddles 51 so that when they are depressed they will stay depressed by their own weight, thus permitting either the use of a single ball or a plurality of balls in playing the game.

The futility of the Plaintiff's position in attempting to bring the old Fawn game within claim 3 is clearly apparent from the fact that in order to try and read element (f) of claim 3 on the Fawn game he has been forced to again use the contact devices 51, 58 of Faulkner to satisfy the "means" of element (f). However, the contact devices 51, 58 which Plaintiff now says constitute the "means" of element (f) are the same contact devices recited in element (d) and again recited in element (f). In other words, if we analyze Plaintiff's position with respect to element (f) we find that in attempting to read this element on the Defendant's game he has reconstructed it to read as follows:

"means for energizing (contacts 51, 58) said indicators as the associated contact devices (51, 58) are operated."

It is obvious, therefore, that the Plaintiff has argued himself into the absurdity of contending that the means which operate as the associated contact devices are operated, are the contact devices themselves.

It is therefore apparent that element (f) of claim 3 is broad enough to read on Nakashima as previously discussed in the section dealing with invalidity, but still is not broad enough to include the Defendant's balanced switch which stays closed throughout the play and therefore obviates the necessity of having separate energizing means such as Gibbs relays R.

If, therefore, claim 3 is construed broadly enough to read on Defendant's switch, then of necessity it must be invalid as likewise and more clearly reading on the Nakashima patent.

Additionally, it is seen that the old Fawn game omits element (g) of claim 3 which reads as follows:

an electric circuit *common* to all of said groups and open until all of the indicators in one of said groups have been energized.

Referring to Exhibit B [R. 371] it is clearly seen that in the Gibbs game the electrical circuit referred to in element (g) is the win circuit comprising relay R3, lead 114' and lead 98, all of which are colored in red, which win circuit is electrically *connected to* all of the segmental circuits which are made up by closure of the various armatures R'. In Exhibit B three of these segmental circuits are shown in colors, a typical horizontal circuit being shown in red at the top of the diagram, a typical vertical light circuit shown in blue and a diagonal circuit

shown in yellow. It will be seen that all of these segmental circuits, red, blue and yellow, are *electrically connected* at their right end to lead 98 of the win circuit and at their left side to power lead 86. The win circuit is therefore clearly *common* to all of the group circuits and is held open until one of these group circuits has been completed and all of the indicators of that group are energized.

An electrical circuit can only be *common* to another electrical circuit, of course, when it is *connected to or connectable therewith*. Consequently, the phraseology in claim 3, a “circuit *common to all* of said groups” which was suggested by the Examiner, can only refer to a situation such as shown in Gibbs where the win circuit is *electrically connected* to a plurality of other circuits.

By reference to Defendant’s Exhibit I [R. 533] it will be seen that in the Fawn games there are no segmental group circuits as in the Gibbs game. It will be further seen that the Fawn win circuit shown in red in Exhibit I [R. 533] is separate and distinct from any circuit associated with the indicator lamps and is operated by mechanical movement of the mercoid switch M. It is submitted, therefore, that element (g) of claim 3 is totally lacking in both the old and new Fawn games.

In summary, we find that neither the old nor the new Fawn games contain structure or circuits which meet elements (f) or (g) of claim 3, and that for these reasons neither the old nor the new Fawn games infringe claim 3.

2. CLAIM 6 IS NOT INFRINGED BY THE OLD GAME:

As previously mentioned, claim 5 covers the interconnection of a group of the Gibbs game units defined by claim 3. Since as pointed out in the preceding section the old Fawn game does not infringe claim 3, a group of the old Fawn games hooked together in the manner taught by Chester or any of the other prior competitive games cannot therefore infringe claim 6 which merely recites a group of the claim 3 units.

There are of course various specific ways in which a group of game units can be electrically interconnected, as demonstrated by the fact that each of the circuits of the prior art patents is slightly different from the other and has a few features specific to it alone.

A comparison of the simplified Gibbs circuit shown in Exhibit G [R. 529] with the simplified Chester circuit shown in Exhibit H [R. 531] shows the close similarity and minor differences between these two circuits.

In both of these diagrams the win circuit has been colored red, the auxiliary circuit which keeps the winning game illuminated is colored purple, and in green is shown the transfer circuit which de-energizes all of the non-winning units. It will be noted that the red, green and purple circuits of Gibbs and Chester are substantially identical with the one exception that the red win circuit of Chester is closed by the mechanical operation of win switch 30, 51 whereas Gibbs' red win circuit is closed by the consecutive closing of the relay armatures R'. In other words, while the Gibbs and Chester circuits accomplish substantially the same purpose, they do so in a slightly different manner.

Now comparing the Chester wiring diagram Exhibit H [R. 531] with the old Fawn game wiring diagram Exhibit I [R. 533] it will be seen that the Fawn game circuit is practically identical with Chester and much closer thereto than it is to the Gibbs circuit. In both Chester and Faulkner we have the red win circuit *mechanically* closed by the operation of a mechanically operated win switch. In Chester it is the win switch 51 while in Faulkner it is the mercoid switch M. In each case the operation of the win switch energizes a coil which in Chester is represented by numeral 53 and in Faulkner by numeral 98. In Chester there are three contacts or switch blades operated by this coil whereas in Faulkner there are only two, but the over-all function of these switches is exactly the same.

By the closing of his triple blade switch Chester first energizes his coil R2 through the left-hand switch blade which sets up a self-holding circuit from main power line C up through the left-hand switch blade to coil 52 and thence back through purple horizontal leads to by-pass coil 62 which connects with main power line 61. In Faulkner this same operation is accomplished by the switch blade 84 moving over to close its purple circuit which by-passes the main power shut off and keeps the winning game energized.

Movement of the middle switch blade of Chester to the left energizes the blue win lamp circuit which connects through the purple circuit back to main 61. The same is true in Faulkner where the win lamp 22 is energized by current flowing through lamp 22, switch blade 84 and the purple transfer circuit.

The third function performed by the relays 53 and 52 of Chester is to set up a separate green circuit which energizes main line solenoid 62 which opens the main switch, thus killing main line A and all competing games.

Similarly, in the Fawn game, the left-hand switch blade sets up the green transfer circuit which energizes coil 106, opens switch 112, thereby breaking the circuit in main solenoid 111 and opening main switch 110 to kill main line 78 and all of the competing units.

It is thus clearly seen that the Defendant Faulkner instead of appropriating the Gibbs circuit as alleged by Plaintiff merely adapted the Chester circuit to his particular apparatus, *i. e.*, he interconnected a number of his individual game units of the Nakashima type in exactly the same manner as taught by Chester.

Consequently since the individual units of Faulkner do not infringe claim 3, a bank of them connected as taught by Chester cannot infringe claim 6 which recites a plurality of the claim 3 units.

3. CLAIMS 7 AND 8 ARE NOT INFRINGED BY THE OLD GAME:

Since, as we have just seen, claim 6 is not infringed by the old Fawn game, its dependent claims 7 and 8 of course are not infringed for the same reasons.

Claim 8 is additionally not infringed because its element (g) calls for

“means under the control of an operator for opening and closing the circuits of all of said units simultaneously at will.”

This of course refers to the main line switch 68 in the Gibbs patent which is entirely different from the structure in the Fawn game, for in the Fawn game the main power switch is not manually operated.

4. CLAIMS 9 AND 10 ARE NOT INFRINGED BY THE OLD GAME:

Claim 9.

As previously shown, claim 9 is void for failing to define the invention described in the Gibbs specification. The wording that creates this situation is doubly unfortunate for Gibbs in that it not only renders the claim void but also renders it clearly not infringed by Defendant.

Referring again to our claim analysis of claim 9 [R. 368, 369, 270], we find that elements (e) and (f) state as follows:

(e) means for holding said signal circuit open until all of the indicators of any group on *each* of said units have been energized, and

(f) for closing said signal circuit when *all* of the indicators of any *unit* have been energized.

Obviously, these elements of claim 9 do not read upon the old Fawn game since in the old Fawn game the win circuit is operated when only a *portion, i. e., a group*, of the indicators of any unit have been energized.

Mr. Gibbs in his desire to cover the whole field of automatic Bingo games evidently relied on claims 6, 7 and 8 to cover the game which he disclosed in his patent, and wrote claims 9 and 10 to cover another class of games. In so extending the scope of his patent by directing claim

9 to a type of game where the signal circuit is closed in response to energization of *all* the indicators on the winning unit, Gibbs used wording which fails to cover either his own game or the old Fawn game. It is axiomatic that each claim in a patent must stand on its own feet for the general public is entitled to take each claim at its face value. All members of the public are entitled to read claim 9 of the Gibbs patent or any other claim in an issued patent and to rely on what it says. In this case, the claim clearly states that it covers only an apparatus which has

“means for closing said signal circuit when *all* of the indicators of any *unit* have been energized.”

The general public, including this Defendant, is entitled, therefore, insofar as this claim is concerned, to make an apparatus having a signal circuit which is closed when *only a portion* of the lamps in a winning game are energized.

The Plaintiff will undoubtedly urge that this claim should be judicially reconstructed to cover a plurality of his individual game units as defined in claim 3. However, this contention can avail Plaintiff nothing since if the Court should so construe claim 9, then it is nevertheless avoided by the old Fawn game since, as has been pointed out, the old Fawn game does not infringe claim 3.

Claim 10.

Claim 10, being dependent upon claim 9, is not infringed for the same reasons that claim 9 is not infringed.

Additionally, claim 10 is clearly not infringed by either of the Fawn games since there is no “audible signal” in

either of the Fawn games whatsoever. Claim 10 adds to claim 9 the following:

“an *audible signal commonly connected* with all of said units and adapted to be operated upon the closing of the supplementary signal circuit of any of said units.”

It is therefore clearly apparent that no matter what construction is placed upon claim 9 that claim 10 cannot possibly be infringed by either of the Fawn games.

E. THE MATTER OF DERIVATION.

It is fundamental patent law that a patentee's invention is measured by the scope of his claims. He is entitled to that which he claims and in some instances mechanical equivalents thereof, *but nothing more*. The *only reason* for having claims in a patent is to inform the patentee and the public of the extent of the monopoly granted so that the members of the public may be guided thereby in making further advances in the art without infringing upon the patentee's monopoly.

As a matter of law, therefore, any member of the public may, and should upon entering an art, read the claims of all patents in that art so that he will know what he can and cannot do in utilizing the fund of common knowledge in said art.

To say therefore that a person who has built a device which is outside of the claims of a patent, is nevertheless guilty of infringing that patent, merely because he read the patent or happened to see one of the patentees devices on the open market prior to building his own machine, is to do violence to the fundamental statutory

and decisional law pertaining to patents. Yet this is exactly what the trial court ruled in this case. This ruling is supposedly supported by Finding of Fact No. 13 [R. 38] which however is directly contrary to the evidence brought forth at the trial.

It is appellant's position herein that the question of derivation has no part in the issue of infringement. If it involves the use of information obtained by the Defendant as the result of his employment by the patentee or other confidential relationship, it may be relevant to the issue of damages only.

In this case of *Gibbs v. Faulkner* there is no showing whatsoever that the Defendant or any of his agents or employees had any connection whatsoever with the Plaintiff or Plaintiff's games, or were even aware of the Plaintiff, his games or his patent prior to the start of this suit. The actual facts as shown by the testimony are as set forth in Appellant's proposed Alternate Finding No. 13 [R. 23].

Defendant objected [R. 81] to the introduction of any evidence relative to the Loeff game, but the objection was overruled and Mr. Wiser, one of the Defendants in the case of *Gibbs v. Loeff et al.*, was permitted to testify concerning the Loeff game. It will be remembered of course that the *Gibbs v. Loeff* case was settled by giving Gibbs a consent decree for which Gibbs gave to Loeff and Wiser the license for the City of Long Beach. Therefore, the Defendant herein is a competitor of Messrs. Loeff and Wiser, and the testimony of Mr. Wiser is obviously biased.

However, by Mr. Wiser's own testimony there was no copying either by him or Mr. Loeff or this Defendant of the Gibbs apparatus. (See Appendix, p. 14.)

It is apparent from Mr. Wiser's testimony as follows:

- (1) He saw a Gibbs game in 1937 and became familiar with the method of play but did not see inside of the game.
- (2) In 1940 three years later Mr. Wiser constructed a game for himself and Mr. Loeff.
- (3) Six years later in February, 1946, Mr. Wiser and Mr. Loeff were sued by Gibbs for alleged infringement of the Gibbs patent.
- (4) In February, 1946, for the first time Mr. Wiser examined a copy of the Gibbs patent and became familiar with the circuits therein disclosed.
- (5) Mr. Wiser has an indirect interest in this present suit in that he and Mr. Loeff are the licensees of Gibbs for the City of Long Beach and this Defendant is their only competitor.

There is not one shred of evidence in the record to indicate that the Fawn game bears the slightest resemblance to the Loeff game except in outward appearance and the method of play. There is nothing in the record as to how the Loeff game is constructed or how the circuits are arranged therein. There is nothing in the record to show that there is any similarity between the Loeff game and the Gibbs game or any infringement of the Gibbs patent by the Loeff game. The Plaintiff seeks to draw an inference of infringement by the bare fact that Loeff and Wiser settled their suit with Gibbs by giving a consent decree and taking a license for the City of Long Beach.

Obviously, this inference can have no weight since there is nothing in the record to indicate but that it was materially to Loeff's advantage to pay Gibbs a nominal

amount for an exclusive license, *provided Mr. Gibbs started suit against Mr. Faulkner and closed up his business*. The logic of such an arrangement is well shown by the fact that within a very short time after the *Gibbs-Looff* case was settled, Mr. Gibbs filed suit against the only two competitors of Mr. Looff, to-wit, Mr. Hicks, *et al.*, and Mr. Faulkner. As mentioned, Mr. Hicks capitulated without a fight,—Mr. Faulkner is still fighting.

III.

Conclusion.

It is submitted that the Decree of the lower court should be reversed on all points and in particular, that the Gibbs patent be held invalid as to all of the claims in suit and not infringed by either of the Fawn games. It is believed that the Defendant-Appellant has successfully demonstrated that:

1. Claim 3 of the Gibbs patent is anticipated by the prior patent to Nakashima and is therefore invalid for lack of novelty.
2. Claims 6, 7, and 8 are anticipated by the prior patent to Prina and are therefore invalid for lack of novelty.
3. Claims 9 and 10 of the Gibbs patent are invalid for claiming an invention other than the one disclosed in said patent.
4. All of the claims in suit are invalid for lack of invention.
5. The new Fawn game does not infringe claims 3, 9 or 10 of the patent in suit.
6. The old Fawn game does not infringe claims 3, 6, 7, 8, 9 or 10 of the patent in suit.

This case should therefore be remanded to the lower court with instructions to dismiss the Complaint herein and award judgment to Defendant on his Counterclaim on the grounds of invalidity of the patent in suit and non-infringement thereof, and that Defendant-Appellant be awarded his costs of suit and attorneys' fees incurred in the lower court and his costs and attorneys' fees incurred in this appeal.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX.

Construction and Operation of Gibbs Game.

As previously mentioned, the Gibbs patent discloses an electrified Bingo game comprising a plurality of game units electrically connected together. Referring to the drawings of the Gibbs patent [R. 295-301], it is seen that each of said game units includes a table T having a horizontal game board C provided with a plurality of apertures or pockets 26-50 through which a ball B is adapted to drop when it is rolled across the board C. At the rear of the game board C is an annunciator panel A having a plurality of indicator lights numbered 1-25 thereon. The indicator lights and the apertures are arranged in the same order, to-wit, five rows of five each, and each indicator lamp is connected to a switch S comprising resilient contacts 54 and 55 disposed beneath its corresponding aperture. This general organization is seen best in Figs. 1-4, inclusive, of the patent.

As seen diagrammatically in Figure 6 of the patent but best in Exhibit B [R. 371] each of the switches S has associated therewith a relay R having an armature R' provided with a plurality of pairs of contacts one of which is numbered 99 and the other 113. The wiring of the game is such that when a ball is dropped through one of the apertures 1-25, as for example aperture No. 1 which is illustrated in the upper left-hand corner of Fig. 6, the switch S underneath this aperture is momentarily closed, completing a circuit through its relay R. Energization of the relay R pulls its armature R' down so that all of

its contacts engage the stationary contacts immediately therebelow. In particular the armature contacts 99 bridge stationary contacts 88 and 88' and armature contacts 113 bridge stationary contacts 112 and 112'. This action is also seen in Figure 7 of the Gibbs patent.

Since the switches S are only closed momentarily when the ball B passes thereover, it is necessary to provide additional means to keep the indicator lamps energized so that the player will at all times know the progress he is making in the game. This function is performed by the relay R since when the armature R' bridges the contacts 112 and 112' it completes a holding circuit through the terminal 104 to keep the relay R and its associated indicator lamp energized after the switch S opens.

In a competitive game it is of course desirable to immediately indicate the fact of a win to the players and operator. It is also desirable, and was well known at the time Gibbs entered the field, that immediately upon one player making a win, the other game units should be disconnected to prevent further play by the other players. This purpose is accomplished in the Gibbs game by having the armatures R' complete portions of separate potential win circuits, horizontal, vertical or diagonal so that when the fifth indicator in a line has been energized the win circuit will be complete.

For example, when the contacts 99 of indicator No. 1 bridge contacts 88 and 88' the circuit is completed from main lead 87 over to fixed contact 90 of indicator No. 2. If then a ball drops through the aperture corresponding

to indicator No. 2 its armature R' is pulled down by its relay R, causing its contacts 99 to bridge fixed contacts 90 and 90', thus setting up the second portion of the top horizontal win circuit over to fixed contact 92. When armature contacts 99 of indicators, 3, 4 and 5 bridge their respective fixed contacts the horizontal win circuit is completed through fixed contact 96' to the other main lead 98.

This system of sequentially completing progressive segments of a master circuit has of course long been known in the art, as shown in the McGregor patent [R. 411-421] issued in 1918.

It is seen that when the top series of five indicator have been energized by their respective relays R the win circuit shown in red in Exhibit B [R. 371] is made. This red win circuit passes through a holding relay R3 and also energizes a win lamp L disposed on top of the annunciator panel A of the winning game unit. Current passing through relay coil R3 causes its armature R5 to move downwardly into engagement with its three sets of fixed contacts 119, 121 and 112, thus establishing the auxiliary circuit shown in green in Exhibit B which energizes the coil of feed relay R2 and transfers power to the previously dead line 60. This rings the win bell 69 and energizes the feed relays R2 in all the other game units.

Whenever feed relay R2 is energized, its armature R4 is pulled down, thus breaking the main circuit for that game unit shown generally by brown lines in Exhibit B.

An auxiliary circuit is provided in the winning game unit only, between fixed contact 119 of holding relay R3 and line 86, as shown by the purple lines in Exhibit B. In other words, holding relay R3 when energized not only transfers power to the previously dead line 60 to energize all of the feed relays R2 and disconnect all of the units except the winning unit, but it also transfers power to an auxiliary circuit in the winning game unit so that its lights will stay lit until the operator pulls the main switch to disconnect all units.

It will be seen, therefore, that whenever a win circuit is completed, for example, a horizontal line of five as illustrated in red in Exhibit B, or a vertical line of five as illustrated in blue, or a diagonal line of five as illustrated in yellow in said exhibit, the holding relay R3 of that winning unit is energized, with the result that the win light L on that unit is illuminated, bell 69 is caused to ring, and the feed relay R2 on each of the competing units is energized, thus disconnecting all of the competing units and preventing further play thereon.

Construction and Operation of Old Fawn Game.

The Defendant's old Fawn game is illustrated and described in detail in Exhibit 2 [R. 309-341]. A less detailed but more graphic description of the old Fawn game is found in the testimony of Defendant's expert, Mr. Harold Mattingly, commencing at R. 180. Mr. Mattingly's discussion refers to the photos and diagram of Exhibit 2, physical Exhibit E comprising a mechanical mechanism taken from one of Defendant's Fawn games, and Exhibit F comprising two colored schematic drawings [R. 527] of the mechanism Exhibit E. Reference is made to said exhibits and Mr. Mattingly's testimony for a detailed treatment of Defendant's old Fawn game, the essential features of which will be described here for convenience. The numerals used in the following description refer to the photographs and wiring diagram in Exhibit 2 [R. 325-341, incl.].

Each of the old Fawn game units comprises an inclined playing board 25 provided with a plunger 26 designed to propel a metal ball 27 across the board and into one of a plurality of holes 31, 32 arranged in two transverse rows across the board instead of in five rows of five as in the Gibbs patent.

At the rear of the board 25 is an annunciator panel 21 having 25 indicator lights thereon, each of the lights corresponding to one of the holes in the playing board. The lights on the annunciator panel 21 correspond in number but not in arrangement with the holes upon the playing board and are energized when the ball 27 passes through the appropriate hole.

Immediately below each of the holes in the playing board is a switch mechanism comprising a paddle 51 and a pair

of spring contacts 58 engaged by the paddle when it is depressed. The paddles 51 are mounted so as to tilt downwardly when the ball 27 is dropped upon the paddle after falling through the hole. Once the paddles are depressed they stay depressed by virtue of their own weight and slight friction from their engagement between the pair of switch contacts 58, thereby maintaining their respective lamps illuminated.

At the rear of the mechanism Exhibit E and as illustrated in Exhibit F, there is a series of small wheels 61 mounted on a common shaft, each one of which has a pin 64 extending radially upwardly to normally engage behind the rear end of a corresponding paddle 51. Consequently, when the forward end of the paddle is depressed by the ball dropping thereon the rear end of the paddle is raised, releasing the pin 64 and its wheel 61. As the ball is dropped through other holes on the playing board, additional paddles will have their rear ends raised to permit release of their corresponding wheels to eventually set up a mechanical win mechanism. When the ball is dropped through the fifth hole of a series corresponding to a line of five lights on the annunciator, a win bar is pulled forward by a spring causing mercury switch M to close.

Referring particularly to Exhibit F [R. 527], the upper figure illustrates the position of the various mechanical parts of the Fawn game prior to the operation of any of the paddles. The paddles 51 are colored yellow and it will be seen that their rear ends act as stops against which the pins 64 of the wheels 61 (both colored red) bear, and as long as the paddles remain with their rear ends down, the wheels are prevented from rotation [R. 184].

Extending across in front of all of the wheel pins is a win bar colored green, the lower end of which carries the

small glass-enclosed mercury switch M. As the forward ends (the far ends in Exhibit F) of the paddles are moved downwardly, their rear ends will assume the position shown in the lower figure in Exhibit F [R. 527] where it will be seen that the rear ends of the first five of the paddles have been raised and have released the wheel pins previously held by them. Release of the fifth red pin permits a spring-operated cross bar colored blue to be pulled forwardly to move all of the vertical red pins against the green win bar which is thereby rocked forwardly sufficient to close the mercury switch M.

It will be understood that the blue win bar cooperates only with the five wheels which correspond to the row of five lights across the top of the annunciator, this being used for illustrative purposes. Since twelve win light combinations are possible, twelve cross-bars are provided, one for each possible combination of five wheels and lights. Selector pins are also provided which need not be described here.

One of these additional cross-bars, shown in brown in Exhibit F, is for producing one of the possible vertical combinations and extends across the machine to engage the pins on the wheels which correspond to these vertical lights. When the paddles for this vertical line of lights have released their pins the brown bar will swing forward and in so doing will move its five pins on the wheels corresponding to its particular line of vertical lights into engagement with the green win bar to swing the same forward and close the mercury switch M.

A third cross-bar which has been colored purple extends across all of the wheels and engages pins that will be on those wheels which are associated with a diagonal line of lights so that when those wheels are released by operation

of their paddles the purple cross-bar will swing forward to move the green win bar forward to close the mercury switch.

As illustrated in the wiring diagram Fig. 9 [R. 341] and as better seen in Exhibit I [R. 533] the normal main line feed circuits are numbered 77 and 78. Each of the annunciator lights is connected to these mains through its respective switch 58 so that as the switches 58 are closed a circuit is made through the lines colored brown in Exhibit I, to-wit, from main 77 through leads 92, 91, 90, a switch 58 up to the annunciator light, back down through leads 85, switch arm 84 and lead 83 to main 78. A similar circuit is made for each of the annunciator lights as its switch 58 is closed.

When the fifth annunciator light in a row has been illuminated by the closing of its switch 58 the wheels of the five illuminated lights are rotated and permit rotation of the win bar as previously described to tilt the mercury switch M thus energizing the circuit outlined in red in Exhibit I. This circuit extends from line 92 through lead 93, the switch M, leads 99 and 121, relay coil 98, leads 122 and 100, through switch arm 84 and lead 83 to the main line 78. Energization of the relay coil 98 by completion of the red win circuit pulls both blades of the switch S over to the left, causing the right blade 84 which previously was connected with lead 83 to be transferred to terminal 84' which completes the purple circuit down through leads 101, 103, 104 and 114 back to main line 78. This purple circuit acts as a transfer circuit to maintain power to the annunciator board of the winning game.

Movement of the left-hand blade 109 of switch S over to the upper end of lead 108 sets up the green circuit

comprising leads 108, 107, relay coil 106 and lead 114 back to main line 78. Energization of this green circuit and consequently relay coil 106 pulls armature 112 to the right, opening the yellow circuit of which relay 111 is a part. Interruption of the yellow circuit and consequent de-energization of the coil 111 permits main switch 110 to be pulled to the left by a spring (not shown) thereby breaking the circuit to main power line 78, and cutting off current to all of the non-winning game units. However, since the purple transfer circuit has been completed which by-passes main line 78 beyond its switch 110, the lights on the winning board stay illuminated.

When the red win circuit on the old Fawn game was completed by movement of the mercury switch M, a signal light 22 (not present in the new Fawn game) at the top of the annunciator of the winning game unit was illuminated to indicate a win on that unit. The red win circuit, being fed through the purple transfer circuit, the win light remained on until the operator by movement of the main control handle moved the switch S back to its original position, thus breaking the purple circuit, re-energizing the main feed relay 111 and closing the main line switch 110, restoring all connections to their original form.

Construction and Operation of New Fawn Game.

The playing board, annunciator panel and mechanical parts of the new Fawn game are the same as in the old Fawn game, utilizing the same paddles, wheels and win bars to operate a mercury switch M when a win has been accomplished.

However, the electrical circuits and methods of play are entirely different in the new Fawn games.

The old Fawn game (like the Gibbs game) was competitive since the players played against each other and when a player had effected a win on his game unit the game units of all the other players were immediately disconnected, thereby stopping the game. The new Fawn game, on the other hand, is provided with a timing clock so that all players play for the same length of time and all may win if they are sufficiently skillful. Even though one player makes a win, none of the other games is disconnected until the allotted time has elapsed. In other words, the new Fawn game is non-competitive in that each player is individually playing against the clock instead of against the other players.

The timing mechanism of the new Fawn game and the circuits connecting it to the game units are shown in Exhibit J [R. 535] in which the upper portion of the diagram is a reproduction of two of the game boards illustrated in the wiring diagram [R. 341 of Exhibit 2] the circuits above the main power line 77 being the same as before except that a single bladed switch 84 has been substituted for the two bladed switch S of the old game. The single blade of switch 84 functions the same as the blade 84 of the old switch S and sets up a purple transfer

circuit, but the auxiliary green circuit of the old game shown in Fig. 9 [R. 533], is omitted.

The lower portion of the diagram Exhibit J [R. 535] shows the wiring for the timer and how it cooperates with the individual game units to shut down the game only when the pre-determined time has elapsed.

It will also be seen that there are *no win lights* on the annunciator panels as in the old game.

It should also be noted that there is one error in Exhibit J, to-wit, the main line switch 110 is shown in its closed position, whereas, with the timing mechanism in the position shown, the switch 110 would be open.

In the old Fawn game the main line switch 110 was controlled by the operation of the relay 106 which was energized immediately upon the making of a winning combination on any of the game units to thereby de-energize relay 111 which normally holds the main switch 110 closed. In the new Fawn game, however, the relay 111 is under the control of an auxiliary relay 151 which is in turn controlled by the time clock mechanism which is shown at 200 on Exhibit J.

Another distinctive feature of the new Fawn game circuit is the addition to the re-set bar or handle 207 of switch 208 which is momentarily closed when the re-set bar is operated to re-set all of the switch arms of the game units at the end of a game.

As in the old Fawn game, the operation of the mercury switch M in response to movement of the wheels and win bars underneath the playing board energizes the relay 98 which pulls the switch arm 84 over from its normal contact with lead 83 to terminal 84', thus shifting the power

circuits on the winning board away from the power line 78 and onto a subsidiary power line 78' which extends from the source of power on the far side of the power switch 110. This transfer circuit colored in purple which is operated in response to the completion of the red win circuit merely insures that each game unit on which there is a winner before the time clock shuts down the play will have its annunciator board remain illuminated at the close of the play.

In operation, the new Fawn game is started by the operator moving the re-set handle 207 downwardly to mechanically restore all of the switch blades and all of the paddles on all of the machines to operative position and at the same time close the switch 208 which energizes relays 161 and 151. Relay 151 then closes its contacts 150 to thereby establish a circuit which energizes the main relay 111 to pull the main switch 110 into the closed position shown in Exhibit J.

Relay 161 is likewise energized by the closing of the switch 208 so that its contacts 162 are closed and in that way supplies current around the switch 208 to keep the relays 161 and 151 energized even though the re-set handle is allowed to return to its normal position.

The timer itself consists of a box in which is mounted a disc in the form of a cam identified by the reference numeral 201, the cam having a notch 203 at one point in its periphery in which rides a finger 204 pivotally mounted and having a mercury switch 205 operable thereby.

As the timer cam 201 is rotated by the motor 200 the notch in the cam is moved from under the finger 204 which is thereby lifted to close switch 205 which continues the

energization of the main power switch 111 for the time period required for the cam to make one complete revolution and re-align the notch 203 under the end 204a of the finger 204. The switch 205 is thereby re-opened and the circuits to relays 151 and 161 are opened to de-energize the main power switch coil 111.

The timing motor is connected to the cam by means of a friction drive so that by operating a handle 107 the friction disc 202 can be moved toward the center of the cam 201 or away from it, thereby changing the timing period by changing the speed at which the cam 201 is rotated.

During the play a win may be made on any of the game units and the making of a win does not affect the operation of the rest of the games which continue to operate during the allotted time. Consequently, there may be two, three or more winners during one game period.

The re-set handle 207 is on a long shaft that extends underneath all of the games in a bank, which shaft is connected at each game unit to a re-set lever on the mechanical mechanism of that game unit so that when the re-set shaft is rotated the individual game re-set levers are pulled back, thus forcing all of the paddles back to their original positions and pulling the win bars back to their original positions behind all of the radial pins on the little wheels.

As previously mentioned, the new Fawn game has no win lights at the top of the annunciator board nor any other "supplementary means" for indicating a win.

Furthermore, the new Fawn game is not a competitive game, and the trial court so held.

Testimony Re Derivation.

The following testimony [R. 85] is illuminating on the subject of what if any copying Mr. Wiser did of the Gibbs game at Santa Monica:

“Q. When you went over to Santa Monica to see the Fascination Game did you play the game? A. Yes.

Q. Did you examine it inside, the wiring diagrams? A. No.

Q. You did not see inside of it? A. No.

Q. What you set out to do was to copy the method of play of that game? A. Yes.

Q. Was that game your original construction as to the circuits involved in the inside? A. Yes.

Q. You designed all the circuits, did you? A. Well, not myself; myself and the men that worked with me.

* * * * *

Q. Was your playing board similar to the playing board of Mr. Gibbs' machine in Ocean Park? A. Only in the respect that it had the 25 holes, numbered holes.

Q. I see. A. That were correspondingly indicated on the annunciator board.

Q. When did you first become familiar with the circuit in the Gibbs patent? A. When I found his patent in the—let's see—when I went down to the library and looked his patent up in the records.

Q. When was that? A. That was in February, 1946.

Q. What was the occasion of your interest in the Gibbs patent? A. Being associated with Mr. Loeff

in the operation of the Lite-A-Line games it was to my interest to investigate Mr Gibbs' Patent.

Q. That was when he sued you and Mr. Loeff, was it not? A. Yes.

Q. Were you a party defendant in that action? A. Yes.

* * * * *

Q. By Mr. Fulwider: Are you still in partnership or associated with Mr. Loeff in the operation of the Lite-A-Line Game in Long Beach? A. Yes.

Q. Do you have a financial interest in the outcome of this litigation? A. No.

Q. You do have an interest in this, that you are interested in minimizing competition in Long Beach, are you not? A. Yes.

Q. If this Defendant were enjoined that would inure to the benefit of your business, I assume? A. Yes."

POINTS AND AUTHORITIES.

Law Point 1.

THE CLAIMS MEASURE THE INVENTION.

- (a) “. . . the claims measure the invention. They may be explained and illustrated by the description. They cannot be enlarged by it.”

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 419.

- (b) “The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute.”

Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 510.

- (c) “In view of the statute, the practice of the Patent Office, and the decisions of this Court, we think that the scope of Letters Patent should be limited to the invention covered by the claim, and that though the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specification.”

Railroad Co. v. Mellon, 104 U. S. 112, 118.

- (d) "The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it."

McClain v. Ortmyer, 141 U. S. 419, 432, quoted with approval in *Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co.*, 1 F. (2d) 573, 679 (C. C. A. 9).

Law Point 2.

THE CLAIMS MUST BE DEFINITE, UNAMBIGUOUS AND READ ON THE PATENTEE'S OWN STRUCTURE.

- (a) "The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

White v. Dunbar, 119 U. S. 47, 51-52.

- (b) "The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it leaves no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights. The genius of the inventor should not be restrained by vague and indefinite descriptions of claims in existing patents, from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the

patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent."

Merrill v. Yeomans, 94 U. S. 568, 573-74.

- (c) "All claims are required to be definite so that the public may know what they are prohibited from doing during the term of the patent, and what they are to have at the end of the term, as a consideration for the grant. *Brooks v. Fiske*, 15 How. (56 U. S.) 212, 214-15;"

Walker on Pats., Deller's Ed. 1233, 4.

- (d) "The statutory requirements relevant to particularity in the descriptions and claims of Letters Patent are conditions precedent to the authority of the Commissioner of Patents to issue such documents, and if such document is issued, the description or claims in which do not conform to these requirements, then that document is void."

Walker on Pats., Deller's Ed. 1273.

- (e) "The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them."

Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co., 1 F. (2d) 673, 679 (C. C. A. 9).

quoting with approval from:

McClain v. Ortmyer, 141 U. S. 419, 423.

Law Point 3.

WHAT IS NOT CLAIMED IS DEDICATED TO THE PUBLIC.

- (a) "It is a well-known rule of patent law that anything disclosed but not claimed is dedicated to the public. This principle . . . may be deemed to be elementary."

Rip Van Winkle Bed Co. v. Murphy Wall Bed Co., 1 F. (2d) 673, 679 (C. C. A. 9).

- (b) "Of course, what is not claimed is public property."

Mahn v. Harwood, 112 U. S. 354, 361.

- (c) "The patentee by claiming what he regards as new, disclaims or dedicates to the public the remaining parts. *The Corn-Planter Patent*, 23 Wall. (90 U. S.) 181, 182; *Rozell v. Lindsay*, 133 U. S. 97, 101."

Stedman on Patents 294.

Law Point 4.

THE PATENTEE IS BOUND BY HIS CLAIMS.

- (a) "As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

Keystone Bridge Co. v. Iron Co., 95 U. S. 274, 279.

- (b) "Since the inventor must particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is."

Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 394.

- (c) "Where a patentee has narrowed his claim, in order to escape rejection, he may not 'by resort to the doctrine of equivalents, give the claim the larger scope which it might have had without the amendments, which amount to disclaimer."

Smith v. Magic City Kennel Club, 282 U. S. 784.

Law Point 5.

OMISSION OF AN ELEMENT AVOIDS INFRINGEMENT.

- (a) "A defendant who omits one of the material elements of the combination does not infringe."

Dunkley v. Central Calif. Canneries, 7 F. (2d) 972, 975 (C. C. A. 9),

quoted with approval in *Magnavox Co. v. Hart & Reno*, 73 F. (2d) 433, 444 (C. C. A. 9).

- (b) "Omission of one element or ingredient of a combination covered by any claim of a patent, averts any charge of infringement based on that claim."

Walker on Pats., Deller's Ed. 1695.

- (c) "If the defendant omits one or more of the material elements which make up the combination, he no longer uses the combination; and it is no answer to say that the omitted elements are not essential, and that the combination operates as well without them as with them."

Magnavox Co. v. Hart & Reno, 73 F. (2d) 433, 444; 23 U. S. P. Q. 211, 222 (C. C. A. 9),

quoting with approval from the C. C. A. 9 case of *Wilson & Willard Mfg. Co. v. Union Tool Co.*, 249 Fed. 729, 731.

- (d) "A combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. *Vance v. Campbell*, 1 Black (66 U. S.) 427, 430; *Yale Lock Co. v. Sargent*, 117 U. S. 373 (1886);"

Walker on Pats., Deller's Ed. 1697.

Law Point 6.

ALL ELEMENTS SPECIFIED IN A CLAIM ARE MATERIAL.

- (a) "And where a claim for a combination specifies a certain element as entering into it, such element is thereby made material and the court cannot declare it immaterial."

Walker on Pats., Deller's Ed. 1234.

- (b) "The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such reference to the descriptive part of the specification as carried such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. It is be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

Fay v. Cordesman, 109 U. S. 408;

Shepard v. Carrigan, 116 U. S. 593, 597.

- (c) "A part which is made an essential element of a combination claim by the patentee must be given effect as a limitation, although unimportant in actual use. *Firestone Tire & Rubber Co. v. Seiberling*, 257 Fed. 74, C. C. A. 6."

Walker on Patents, Deller's Ed. 1259.

- (d) "The patentee makes all the parts of a combination material, when he claims them in combination and not separately. *Water-Meter Co. v. Desper*, 101 U. S. 332, (1880); *Brozen v. Davis*, 116 U. S. 237 (1886)."

Walker on Pats., Deller's Ed. 1697.

Law Point 7.

TO BE EQUIVALENT, A DEVICE MUST PERFORM THE SAME FUNCTION IN SUBSTANTIALLY THE SAME WAY.

- (a) "One thing, to be the equivalent of another, must perform the same function as that other. *Machine Co. v. Murphy*, 97 U. S. 120, 125 (1878); *Rowell v. Lindsay*, 113 U. S. 97, 103 (1885); *Roller Mill Patent*, 156 U. S. 261 (1895)."

Walker on Pats., Deller's Ed. 1704.

- (b) "The fact that one thing performs the same function as another, though necessary, is not sufficient to make it an equivalent thereof. *Eames v. Godfrey*, 1 Wallace (68 U. S.) 78 (1864); *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 569 (1898)."

Walker on Pats., Deller's Ed. 1706.

- (c) "Function must be performed in substantially the same way by an alleged equivalent, as by the thing of which it is alleged to be an equivalent, in order to constitute it such. *Burr v. Duryee*, 1 Wall. (68 U. S.) 531, 573; *Fornicrook v. Root*, 127 U. S. 176, 181 (1888)."

Walker on Pats., Deller's Ed. 1706.

- (d) "But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine

cannot be patented is of no practical value. . . .
'That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by one are therefore mere equivalents for those of the other.'"

Boyden Power-Brake Co. v. Westinghouse, 170
U. S. 537, 568, 569.

- (e) "If an invention is only a trifling step forward and the claims speak plainly, they preclude resort to the doctrine of equivalents as regards alleged infringement. *Deitel v. Unique Specialty Corporation*, 54 F. (2d) 359, C. C. A. 2 (1931)."

Walker on Pats., Deller's Ed. 1240.

Law Point 8.

THE MATTER OF DERIVATION IS NOT MATERIAL TO THE
ISSUE OF INFRINGEMENT.

- (a) "Where a machine, article, or apparatus does not infringe, infringement cannot be predicated upon an intent to infringe, and it is immaterial whether the lack of infringement results from accident or deliberation."

48 *Corpus Juris* 294.

- (b) "Purpose and intent of an infringer are immaterial in determining the question of infringement. *Kansas City Southern Ry. Co. v. Silica Products Co.*, 48 F. (2d) 503, 508, C. C. A. 8 (1931), cert. den. 284 U. S. 626."

Walker on Pats., Deller's Ed. 1681.

Law Point 9.

UNLESS INVENTION IS PRESENT THE PATENT IS INVALID.

- (a) "Under the statute, (R. S. 4886) the device must not only be 'new and useful,' it must also be an 'invention' or 'discovery.' "

Cuno Eng. Corp. v. Automatic Devices Corp.,
314 U. S. 84, 90; 51 U. S. P. Q. 272, 275.

- (b) "Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent, more ingenuity must be involved than the work of a mechanic skilled in the art."

R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc., 151 F. (2d) 432; 67 U. S. P. Q. 165 (C. C. A. 9).

- (c) "In *Smith v. Nichols*, 88 U. S. 112, 119, the Court said:

'But a mere carrying forward or new and more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.'

. . . Accordingly, the flared construction is not such invention as will sustain a patent."

Wilson-Western Sporting Goods Co. v. Barnhart,
81 F. (2d) 108; 28 U. S. P. Q. 125 (C. C. A. 9).

- (d) “In the case of *Klein v. City of Seattle*, 77 Fed. 200, 204, this Court said:

‘A patent must combine utility, novelty, and invention. It may in fact embrace utility and novelty in a high degree, and still be only the result of mechanical skill as distinguished from invention. . . . It is not enough that a thing shall be new . . . and that it shall be useful, but it must under the Constitution and statute, amount to an invention or discovery.’

The principles stated in these decisions are well settled and require no further discussion.”

Keszthelyi v. Doheny Stone Drill Co., 59 F. (2d) 3; 13 U. S. P. Q. 427 (C. C. A. 9).

- (e) “In *Grinnel Machine Co. v. Johnson Co.*, 247 U. S. 426, 432, the Supreme Court stated:

‘No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices singly or in combination.’

All of the elements of the patent in suit were present in the prior art and combining these elements to make the patented device did not involve invention.”

Eagle, et al. v. P. & C. Hand Forged Tool Co., 74 F. (2d) 918; 24 U. S. P. Q. 181 (C. C. A. 9).

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SOME LIGHT ON THAT PORTION OF THE DECREE
HOLDING THE NEW FAWN GAME TO BE AN IN-
FRINGEMENT OF CLAIMS 3, 9 AND 10.

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266	center
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No. 11,667

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLEE.

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TODD C. FAULKNER,

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vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

Appellant's statement of the case in his brief is for the most part correct.

We dispute, however, his inference that the subject of the Gibbs patent is merely an electrified version of Bingo

We feel impelled to make a parenthetical statement directed to appellant's comments in his brief to the effect that there are only two forms of accused Fawn games: the original or old game, and the altered "new" game. Since this appeal was taken, appellee learned for the first time that a third form existed prior to the trial. We do not believe Faulkner's counsel knew of it at the time he wrote the appellant's brief. The full details of this third game, which chronologically was the very first Fawn game built and operated, are not yet known to us, and what procedure should be followed in bringing this third game before the trial court or this court, we have not determined. We make this statement to inform this court that while the representation by appellant's counsel that only two forms of game are here involved, is correct so far as the record on appeal reveals, there is now known to be a third form, the construction and operation of which was concealed from appellee through the trial, and which, by appropriate means, appellee may take steps to bring into the case.

(Keeno or Tango). The suggestion is probably thrown in to minimize, at the outset, the Gibbs invention. Bingo was a lottery. The arrangement of numbers on the cards of the different players was varied. One player tossed for or otherwise selected *by chance* each number in turn which bound *all* the players. [Tr. 69, 100.]

The Gibbs game is competitive. Each player operates his own unit, the numbers to be lighted are identically arranged on all units, the holes for the ball to drop through are identically arranged, and each player throws or rolls his own ball. The numbers for the holes on the playing table of each unit are for the guidance of the player. The game is one in which skill plays a part. Obstacles are present on the board, which introduce elements of chance which are incidental and test the players' accuracy and skill, in a fashion similar to sand traps, water hazards and trees on a golf course. A player can avoid them but frequently does not, and when he does not, what happens cannot be prophesied.

As long as a large segment of the American public desires to patronize such games at resorts and amusement parks, the Gibbs game, called "Fascination" in most places, will be popular, because it is competitive and does depend upon skill—though obstacles or hazards may interpose themselves—because it moves rapidly, is readily understood, involves electric lights, and nobody can cheat.

We also challenge the statement in appellant's brief, page 5, that about the time the preliminary injunction

was granted, the defendant (appellant) changed the “construction” and “method of play” of the Fawn game, making it a “non-competitive” game—the one referred to as the altered or “new” Fawn game.

The physical elements of playing board, annunciator light panel, playing balls, and arrangement, remained identical. The electrical circuits remained the same with these exceptions which are immaterial; certain light bulbs were unscrewed from their sockets, one wire connection was shifted, and an electric time switch was added as an accessory. The method of play was the same as before: each player sat before his unit playing board, and rolled a ball into the holes, endeavoring by repeated rolling of the ball to light up five lights in a row and thereby become a winner. All the time switch did was to limit the period in which a game could be played. That was purely an addition to, not an omission from, the primary claimed features of the Gibbs patent. Its merits or demerits are, therefore, inconsequential here.

We cannot overlook one other error in appellant’s statement of facts, brief, page 7. He says, that the “*most* glaring of the trial court’s many errors” was in “holding narrow claims 9 and 10 infringed by the new Fawn game when broad claim 6 directed to exactly the same subject matter was held *not* infringed by the new game.” This statement of fact is argumentative, but less silence on our part be construed as acquiescence, we here traverse counsel’s conclusion. He was obsessed with this same misconception during the trial.

In the first place, claim 6 is not directed to exactly the same subject matter as claims 9 and 10. In the second place, claim 6 is more limited than claims 9 and 10 as to *one element* which the trial court found in the altered Fawn game in the broader sense of claims 9 and 10 but not in the limited sense of claim 6.

Appellant further transgressed the rules by arguing in the statement of the case, page 7, that an “equally basic error was made by the trial court in holding claim 3 infringed by the new Fawn game when obviously one of the essential elements of claim 3 is totally lacking in said game.” Suffice it to say, at this point, that counsel is wrong in assigning error and in brashly declaring that an essential element was lacking in the accused game. The “new” Fawn game *added* an electric time switch; it did not omit anything except that the signal light bulbs were unscrewed, and claim 3 does not include signal light bulbs as an element.

Summary of Argument.

I.

Validity of the patent is reinforced by

(1) Decision in *Gibbs v. T. Z. R. Amusement Corporation, et al.*, D. C. E. D., N. Y., Findings of Fact and Conclusions of Law. [Tr. Vol. II, p. 346; Pltf. Ex. No. 3.] Opinion reported in 14 Fed. Supp. 957 (1936).

(2) Consent judgments in several infringement suits, brought variously in the Eastern District of New York, the District of Connecticut, and the Southern District of California.

(3) Numerous licensed operations on royalty consideration, located variously in New York, Massachusetts, Connecticut, New Jersey, Ohio, California, and England. [Tr. 66.]

(4) Lack of anticipatory art. A certain Nakashima patent No. 1,678,573 [Tr. Vol. II, p. 376] which was a file wrapper reference, was named by appellant Faulkner's expert, Mr. Harold W. Mattingly, a patent lawyer, as one of the closest prior art. [Tr. 214, 219-20.] It had been considered by the Court in *Gibbs v. T. R. Z. Amusement Corporation, et al.*, supra, and the Gibbs patent distinguished. It and the remaining prior art patents were properly rejected by the District Court here.

(5) The law.

II.

The Gibbs patent is infringed, as to claims 3, and 6-10 by the "old" Fawn game, and claims 3, 9 and 10 by the "new" Fawn game.

(a) The essence of the Gibbs invention is present in both Fawn games.

(b) Faulkner deliberately imitated and appropriated the principles of the Gibbs invention.

(c) The law on infringement.

Having summarized our points, we will next proceed to develop them.

ARGUMENT.

1.

Validity of the Gibbs Patent No. 1,906,260 Is Reinforced by the Decision of the District Court for the Eastern District of New York in *Gibbs v. T. Z. R. Amusement Corporation*, 14 Fed. Supp. 957.

The Findings of Fact and Conclusions of Law in that case are reproduced as Plaintiff's Exhibit No. 3. [Tr. Vol. II, p. 346.]

The Court's opinion in that case points out that the Gibbs patented game came into commercial success by its introduction and operation in amusement parks during the years 1931 to 1935, inclusive, that much of the testimony had to do with the nature of the defendants' conduct in putting their game into operation after they had been afforded an opportunity to examine the Gibbs game in the concession operated by the corporate licensee at Coney Island during the month of June, 1935.

In the present case the defendant Faulkner put his game into operation after he had been afforded an opportunity to examine a copy of the plaintiff's game in

the concession operated by Loof, who became a Gibbs licensee, on the pike at Long Beach, California.

The Court further pointed out that the defendant's device is so like the plaintiff's that little or no contention is made on the subject of infringement; that such argument as the defendants make goes to the system of wiring only and as that does not form an element of any of the claims an exit from the litigation is not thus rendered available to the defendants.

In the case at bar the original Fawn game was so like the plaintiff's that no contention was made on the subject of infringement when the plaintiff Gibbs brought his motion for a preliminary injunction; and even though with the advice of an attorney or technical man Faulkner went through the motions of unscrewing some lamp bulbs, adding an electric time switch, and changing one wire connection, to evolve what he terms the "new" Fawn game, his defense of asserted non-infringement is feeble indeed, and, as did the defendants in *Gibbs v. T. Z. R. Amusement Corporation*, he leans heavily on asserted anticipation or want of invention.

But in doing so he is squarely confronted with a full and careful analysis by the District Court in the reported case wherein the court, after a description of Nakashima No. 1,678,573, concluded that allowance of the Gibbs patent over the Nakashima reference by the Patent Office was quite justified. This is the same Nakashima patent, a file wrapper reference, which was offered in evidence by the defendant Faulkner and which his expert witness, a well known local patent lawyer, selected as one of the closest references in the present case.

The Court in *Gibbs v. T. Z. R. Amusement Corporation* referred to another of Faulkner's prior art patents,

namely, Esmarian No. 1,612,912, and held that the Esmarian patent is even more remote than Nakashima. The Court also went to some length to explain Irsch No. 1,433,888 and to distinguish Gibbs over that reference, as well as others generally referred to without being identified.

A reading of the opinion in *Gibbs v. T. Z. R.* shows clearly that that case was vigorously defended, and while it was not appealed so far as the records show, that does not detract from its persuasiveness. Moreover, it is entitled to consideration by this Court of Appeals because of the soundness of the reasoning in the opinion.

2.

The Validity of the Gibbs Patent in Suit Is Reinforced by Consent Judgments in Several Infringement Suits Brought Variously in the Eastern District of New York, the District of Connecticut, and the Southern District of California.

The testimony and stipulation concerning these suits in other jurisdictions are found at Tr. 70-71, the offer of the consent judgment in the two cases in this district is made Tr. 61-62 and such consent judgments, Plaintiff's Exhibits No. 4 and No. 5, are found in the Book of Exhibits at pages 355 and 358, respectively. By inadvertence of appellee's counsel only six of the seven consent judgments are enumerated in the Findings of Fact, [Tr. 34-35], but the record shows seven, a fact which is not contested by Gibbs, and whether six or seven, clearly demonstrates that infringers when put to the test by action being filed invariably capitulated, recognizing the Gibbs patent to be valid and that they had infringed the patent.

At the time of this trial the plaintiff Gibbs had no knowledge of any operations which he alleged to infringe other than the game operated by Faulkner, the defendant (appellant), known as the Fawn game. [Tr. 69.] Inasmuch as there were approximately 1500 units then in use located at amusement parks all over the United States and at one location in England, being operated under authority of Gibbs and utilizing the Gibbs patent, the capitulation of the defendants in the suits where consent judgments were obtained is strong evidence of what those defendants thought of the validity of the patent in suit, and should be persuasive upon this Court.

3.

The Validity of the Gibbs Patent in Suit Is Reinforced by Numerous Licensed Operations on Royalty Consideration Located Variouslly in New York, Massachusetts, Connecticut, New Jersey, Ohio, California, and England.

The specific locations are referred to at Tr. 66. Gibbs installed one of the games in Long Beach, California, in December of 1930 [Tr. 66] and the fact that licensed games are operating on the pike at Long Beach today [Tr. 67] further testifies as to the popularity of the game.

Prior to the grant of the patent Gibbs made two outright sales of the game and except for those two, royalties are paid on all of the licensed games. [Tr. 68.]

Commercial success of this character is always to the credit side of patent validity, and if there be any doubt as to validity should tip the scales in favor of sustaining the patent.

The Validity of the Gibbs Patent in Suit Is Reinforced by Lack of Anticipatory Art.

A certain Nakashima patent No. 1,678,573 [Tr. Vol. II, p. 376], which was a file wrapper reference, was named by appellant Faulkner's expert, Mr. Harold W. Mattingly,¹ as one of the closest prior patents. [Tr. 214, 219-20.] It was considered by the Court in *Gibbs v. T. R. Z. Amusement Corporation, et al., supra*, and the Gibbs patent distinguished. The present case was tried on the defense theory that Nakashima was the only prior art patent which could be urged as an anticipation of Gibbs claim 3. Appellant now shifts ground in his appeal brief and urges that additional patents are anticipatory, which fundamental rules of procedure on appeal forbids;² but if this Court considers that as a guardian of the public interest it should consider these additional patents, we say that they are less pertinent than Nakashima, are advanced as an eleventh hour attempt to salvage a hopeless defense, and do nothing to disturb Gibbs' patent.

We are dealing here with *game* devices, and the game as a combination is to be regarded.

All that Nakashima discloses for the present purpose is a game which involves rolling balls into one or more

¹Mr. Mattingly, a Los Angeles patent lawyer, was attorney for the defendants in one of the consent judgment cases, *Gibbs v. Hicks et al.* [Tr. 358-60].

²When defendant's expert selects a patent or patents of the prior art as most like the patent in suit, the Circuit Court of Appeals confines its consideration to those patents.

Campbell et al. v. Mueller et al., 159 F. (2d) 803, 72 U. S. P. Q. 295, 301 (C. C. A. 6), decided February 3, 1947, holding the patent there referred to valid and infringed.

holes and a visible signal or signals in an annunciator. The Nakashima amusement device is a single unit in which a player has three balls to roll. When a ball enters a hole it lodges there, is not returnable to the player, and may *or may not* encounter a switch in a live circuit. The ball must remain in the pocket to hold the switch closed, and if the player rolls the three balls and none of them happen to enter a live circuit pocket no lights are illuminated. In the Gibbs game a single ball is used which having entered a hole and having actuated an electric switch returns to the player for a replay. A switch once actuated remains to the credit of the player by the corresponding lamp remaining energized, and a player may continue successive rolls of the ball, observe the progress of the annunciator by the lighting up of the electric lamps and thus endeavor by proper propulsion and direction of the ball to achieve a winning row either horizontal, vertical or diagonal. He continues this effort in competition with other players operating on identical units, all of the units being electrically interconnected.

Hyashi No. 1,614,471 [Tr. Vol. II, p. 383] discloses what is called a Japanese Peanut Ping Pong Game in which the playing board is inclined downwardly away from the player instead of upwardly from, as in Gibbs, so that the objects played with are not returnable to the player. He is provided with three objects in the form of peanuts which are weighted so that, as the patentee says, instead of rolling in a direct path they will zig zag not only down the board but also partly across the same and never take the same course twice in succession. (Patent page 1, lines 53-56.) When the three peanuts or whatever number may be allotted to the player have been projected the game is over and the player is credited by adding

up the values attributed to the particular lights which have been illuminated. The weighted peanuts have to remain in the pockets in order to keep the lights lighted.

Esmarian No. 1,612,912 [Tr. 391] which was summarily disposed of by the Court in *Gibbs v. T. Z. R. Amusement Corporation, supra*, as being even more remote from Gibbs than Nakashima, makes provision for a plurality of balls to roll over a tally board to register a score. Any ball which falls into a pocket must remain there to maintain the electric switch closed, and the only balls which are returned to the player for re-rolling are those which have not entered a pocket. It further lacks Gibbs' features in that it is shown as a single unit and no suggestion is made of electrically interconnecting a plurality of units for competitive purposes, and it does not have an annunciator panel and arrangement of the Gibbs character wherein horizontal, vertical or diagonal lines of lights are energized to create a winner.

Mader No. 1,622,330 [Tr. 397] adds nothing to the prior patents already discussed. This conclusion is confirmed by reference to appellant's brief, page 27, where counsel says regarding Mader that it "likewise shows a game board," etc., and his description points up nothing in Mader not shown in Haysahi or Esmarian.

Schneider, *et al.*, No. 1,788,336 [Tr. 408] shows an electric ski ball game, its principal contribution, as pointed out by appellant in his brief at page 27, apparently being the fact that a single ball is used which returns to the player after it has actuated a switch located below one of the rings which are arranged in the conventional ski ball pattern.

McGregor No. 1,260,691 [Tr. 412] illustrates a target apparatus wherein each of a plurality of targets is nor-

mally illuminated, and bullet impact on the target operates an electric switch to deenergize the lamp of that particular target. We do not find McGregor referred to in appellant's brief and therefor assume that he no longer considers it pertinent as prior art.

Chester No. 1,598,711 [Tr. 424] is not a ball rolling game but is said to be in the nature of a test of the player's sense of timing by his operation of a hand-wheel which he endeavors to synchronize with the beat of a musical composition played by a mechanical piano or organ.

Wallace No. 1,697,701 [Tr. 436] illustrates a plurality of race tracks over which pigs are chased by farmers.

Higuchi No. 1,454,968 [Tr. 449] substitutes rabbits for pigs.

Prina, *et al.*, No. 1,518,754 [Tr. 469] shows a series of lamps, the last lamp of the series being the goal, and the mechanism is so arranged that in order to reach the goal and win a game the winning player must operate a crank with a gradual acceleration up to about the time that the last lamp is mechanically reached and thereafter he must maintain for a predetermined length of time a uniform speed in order to cause his winning lamp to be lighted. (Patent page 1, lines 31-40.)

Irsch, *et al.*, No. 1,458,884 [Tr. 486] is not the same Irsch patent referred to in *Gibbs v. T. Z. R. Amusement Corporation, supra*. The present Irsch patent is characterized by ducks on wheels mounted on tracks which are propelled under efforts of the players, the winner being the one who causes his duck to travel the full length of a track and causes the egg on the duck to be

discharged into a nest or cup which actuates an electric switch.

Chester, Wallace, Higuchi, Prina, and Irsch are apparently relied upon by appellant on the proposition that each of these patents provides an electric circuit open until a win has been made and that when there is a winner a light lights or a bell rings. (App. Br. pp. 28-29.) What appellant, of course, fails to acknowledge or bring to the Court's attention is the fact that every one of these discloses a game apparatus entirely different from that of Gibbs.

The appellant's contention that it was not invention at the time Gibbs entered the field to add the win signal circuits of the multi-unit games above discussed to the board and ball game units of Nakashima, Hayashi, Mader, and Esmarian, or the converse, is defective in two respects: (1) The Nakashima type of patent game is not the Gibbs type of patent game, nor is the Chester type of game the Gibbs type of game, and the combination of these two types is neither obvious, nor suggested, nor feasible. The players of the Gibbs type game compete for a result which is achieved through the exercise of skill in successively illuminating five annunciator lights in a row, horizontal, vertical, or diagonal, and when this has been accomplished a signal light or supplemental signaling means marks the winning annunciator panel and thereafter maintains the illumination of the winning annunciator panel while the non-winning panels are cut off either simultaneously or at the termination of a playing period as determined by an electric time switch (as in the "new" Fawn game); and since such a combination is neither suggested, nor obvious, nor feasible, when taking into

consideration all of the prior art games the contention of the appellant must fall of its own weight.

Steinmetz No. 1,630,869 [Tr. 500] illustrates an electrical baseball game.

Blackmore No. 1,280,136 [Tr. 515] is a patent for a rain signal, wherein drops of rain fall into a spoon and close a switch to ring a bell, and Lynch No. 1,685,329 illustrates an electric alarm mechanism. Why these patents are in the record we do not learn from an examination of appellant's brief and we will not take the time of this Court to further discuss them.

The foregoing constitutes all of the prior art in the record on appeal. An examination of such art furnishes ample support for Finding of Fact No. X in this case [Tr. 36] that none of the aforesaid prior art patents or the catalog (the latter is not included in the record on appeal) disclose or anticipate or suggest either singly or collectively the subject matter of the Gibbs patent No. 1,906,260 and furnish no basis for any finding or conclusion that the Gibbs patent lacks invention.

5.

The Law in Support of Validity.

Findings of Fact provide a complete foundation for points 1 to 4 concerning validity. Finding VI [Tr. 34] deals with the prior adjudication and consent judgments, and Finding VII [Tr. 35] recites public acquiescence. Finding V [Tr. 34] relates to licensed operations. Finding X [Tr. 36] enumerates the prior art and recites that "None of the aforesaid prior art patents or the catalogue disclose, or anticipate, or suggest either singly or collectively the subject matter of the Gibbs Letters Patent No.

1,906,260, and furnish no basis for any finding or conclusion that the said Gibbs patent lacks invention."

Substantial evidence fully supports the findings.

Circuit Courts of Appeal have recognized the doctrine that in patent cases the findings of fact of the trial court, if supported by substantial evidence, should not be set aside unless clearly erroneous.

O'Leary et al. v. The Liggett Drug Company, 150 F. (2d) 656, 66 USPQ 198 (C. C. A. 6), certiorari denied 67 USPQ 360, 326 U. S. 773, 90 L. Ed. 467;

Gasifier Mfg. Co. v. General Motors Corporation, 138 F. (2d) 197, 199, 59 USPQ 259, 261-262 (C. C. A. 8);

Antonsen v. Hedrick, 89 F. (2d) 149, 151, 33 USPQ 180, 182, (C. C. A. 9);

Ruth v. Climax Molybdenum Co., 93 F. (2d) 699, 702, 36 USPQ 128, 131-132 (C. C. A. 10).

The law of this circuit applicable here is stated in the opinion of Judge Wilbur in *Crowell v. Baker Oil Tools, Inc.*, 153 F. (2d) 972, 68 USPQ 385 (C. C. A. 9) decided February 28, 1946, as follows:

"The question whether or not a new and useful combination is the result of mere mechanical skill or of inventive faculty is one of fact." Citing *Thompson Spot Welder Co. v. Ford Motor Co.*, 265 U. S. 448, 449; *R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc.*, 151 F. 2d 432 [67 USPQ 165] (C. C. A. 9); *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F. 2d 91 [66 USPQ 396]

(C. C. A. 9); Walker on Patents, Deller Ed., Section 25, pp. 112, 115.

* * * * *

“The finding of the trial court can only be reviewed by an appellate court when there is error manifest in the finding.”

The fact that appellee’s counsel prepared and submitted findings of fact for the consideration of the trial judge, and that such findings of fact were adopted by the trial judge as his findings, in no way detracts from their legal force or effect. *Simons v. Davidson Brick Company, et al.*, 105 F. (2d) 518, 43 USPQ 297 (C. C. A. 9).

When adopted, such findings become the findings of the court and are entitled to the same respect as if the Judge himself had drafted them. *O’Leary v. Liggett, supra*, citing *Simons v. Davidson, supra*.

In *Page v. Myers*, 155 F. (2d) 57, 69 USPQ 63 (C. C. A. 9), decided March 27, 1946, by Judges Garrecht, Healy and Bone, opinion by Judge Garrecht, this Court held valid and infringed a patent on a logging trailer. In that case the patent claims had been declared valid in an earlier case by the District Court. In the case in which the opinion of the Court of Appeals was rendered, the District Court made findings which the Court of Appeals declared had support in the evidence, that the art prior to the patent in suit did not cover the combination defined in the patent claims in suit. This Court reviewed some of the landmarks of the patent law. One of the cases discussed was *The Loom Company v. Higgins*, 105 U. S. 580, which set forth the test for dis-

tinguishing patentable combination and mere aggregation. This Court also referred to another decision of its own,³ wherein a patent was upheld, and applying the doctrine of the *Webster Loom* case announced its conviction that the lower court correctly found invention. Judge Garrecht commented:

“It is well settled that what constitutes invention as distinguished from a mere aggregation is a question of fact, and since there is evidence to support the lower court’s finding that there was a new result attained and therefore a patentable combination, we affirm that judgment.”

Cusano v. Kotler, 159 F. (2d) 159, 72 USPQ 62, (C. C. A. 3), decided January 7, 1947, is a well documented opinion sustaining the validity and finding infringement of a patent on a **game board**.

This case is pertinent in reflecting the attitude of a Circuit Court of Appeals on a game patent.

The subject matter of the plaintiff’s patent was a game table for playing a game somewhat like shuffleboard. He combined some of the features of shuffleboard with some of those of the billiard table and produced a game board which was short enough to go into a fair sized room. One end of the playing surface was enclosed by cushions on three sides, which cushions operated as a rebounding medium, the same way as the cushions on a billiard table operate. The opposite end, which could be called the playing end, was surrounded by gutters in the same fashion as a shuffleboard. The scoring space was at this playing end. The game was played in the similar fashion

³*Wire Tie Machine Co. v. Pacific Box Corporation* (C. C. A. 9), 102 F. (2d) 543, 552; 41 U. S. P. Q. 66, 74-75.

to shuffleboard except that the disc gets into the scoring area by rebound from the cushions instead of by direct application of force from the player.

In that case the defendant cited prior patents showing games with various features which the defendant insisted could be assembled into the plaintiff's game without requiring invention.

In rejecting the defendant's arguments the Court of Appeals recognized in passing that invention is supposed to be a question of fact, though the fact finding by the Patent Office and the trial court is seemingly not taken with compelling seriousness by appellate courts in considering patent cases. The Court of Appeals proceeded to its own analysis, recognizing initially that shuffleboards and billiard tables are in the public domain, and restating the defendant's argument that all the patentee had done was to take a piece of each of these old contrivances and put them together. In commenting on this argument, the Court said:

"The argument has its elements of persuasiveness, but we do not think it is to be applied here. We think the plaintiff's table has offered a contribution to the game playing art, and it is an art, that is new and different. The facilities offered by this table are not a form of billiards and certainly, if shuffleboard, a highly modified form of shuffleboard. We cannot ask anyone to produce an entirely new kind of game for we think a few basic ideas underlie most of them. But the plaintiff's invention did provide for playing something different from what existed before and, therefore, he can properly be found to have invented something."

We have an analogous situation in the case at bar where the appellant argues that because the Gibbs patent game borrows something from "Bingo," electrifies it, and utilizes a ball to be rolled into holes over a playing surface which can be found in general in other patents, that Gibbs created nothing new.

Paraphrasing the language of the Third Circuit Court of Appeals we may say that the facilities offered by the Gibbs game are not a form of the electrified ball rolling games of the prior patents and certainly, if "Bingo," a highly modified form of "Bingo." The Gibbs invention did provide for playing something different from what existed before and, therefore, he can properly be found to have invented something.

The Court further commented in a footnote on the commercial success of the plaintiff's patented game, referring to the testimony of the plaintiff as to the sales of his game tables and concluding:

"These factors of commercial success may be used as evidence of invention when other relevant factors leave the question of invention in doubt. *Smith v. Goodyear Dental Vulcanite Company*, 93 U. S. 486 (1876); 1 *Walker on Patents* (Deller's ed. 1937) 234-239."

These decisions constitute authority for the conclusion that in the case at bar the "alternate findings" proposed by Faulkner's attorney have no place in the record, the findings which the trial judge adopted should be given full legal effect, substantial evidence supports them, and they should not be set aside; that a patent on a game is entitled to favorable consideration; and that a new combination as defined in the Gibbs patent displays patentable invention and should be sustained.

Appellant urges (Br. pp. 8 and 46) that claims 9 and 10 are ambiguous. The patent examiner did not find them so, the District Court in *Gibbs v. T. Z. R.*, *supra*, did not find them so, and Judge Yankwich rejected appellant's argument. [Finding VIII, Tr. 35.]

INFRINGEMENT.

1.

Infringement Occurred as to Claims 3 and 6-10 by Manufacture and Use of the "Old" Fawn Game, and as to Claims 3, 9 and 10 by Manufacture and Use of the "New" Fawn Game.

(a) The Essence of the Gibbs Invention Is Present in the Fawn Games.

This essence comprises a game board with holes arranged in a pattern similar to the pattern of electric lights on an annunciator panel, a single ball for the player to throw or roll over the board and which when dropping through a hole will actuate an electric switch, dropping past it and returning to the player for a successive roll. electrical circuits whereby a lamp is energized when the corresponding switch is closed, and means such as a relay to maintain the circuit closed, (an overbalanced switch or a switch of a releasable spring clamp type will perform the same function and is equivalent), the circuits being grouped so that when a line of lights is energized a win circuit is established, a signal of some sort results, and the winner or winners of a plurality of these game units which are electrically interconnected, remain lighted after the non-winners are de-energized. In one form of the Fawn game the win circuit itself operates a relay switch to cut off the non-win circuits, but in the variation

introduced by the "new" Fawn game, the non-winners are cut off by a time switch while the win circuit or circuits, conditioned or controlled by other means, are maintained. The two are equivalent.

This essence of invention is clearly defined in the claims when read in the light of the description and drawings; and not only is the same invention present in both Fawn games but the claims read directly on them.

The Gibbs claims in suit were not narrowed in the face of any rejections, and no file wrapper estoppel can be invoked to restrict them, as suggested in appellee's brief, page 31.

Claim 3 was originally numbered 9; it was rejected only for a technical defect, the examiner saying (file wrapper, page 26) that in line 10 the circuit mentioned is but indirectly introduced. A slight correction resulted in allowance.

Claims 6 (original 12), 7 (original 13), 8 (original 15), 9 (original 16), and 10 (original 17) were allowed as originally filed.

Appellant devotes pages 65 to 70 of his brief to argument that claim 3 is not infringed by the "old" Fawn game, and pages 58 to 64 to argument that claim 3 is not infringed by the "new" Fawn game.

By silence he concedes that all the elements of the claim are found in the old Fawn game except two, namely "means for energizing said indicators as the associated contract devices are operated," and "an electric circuit common to all of said groups and open until all of the indicators in one of said groups have been energized."

His point is that the "means" referred to is an electric relay and that because the Fawn game substitutes an

overbalanced switch there is no equivalent. He argues that the claim calls for two separate elements, (a) a switch which closes momentarily under dropping action of a ball, and (b) a relay actuated upon momentary closing of the switch to energize (keep illuminated) the lights—whereas, he says, the Fawn switch and holding means are one.

He overloops several things: First, that making in one part what the claim describes as two parts does not avoid invention.

“Neither the joinder of two elements of a patented combination into one integral part, accomplishing the purpose of both, nor the separation of one integral part into two, which together accomplish substantially what was done by the single element, will avoid a charge of infringement.” (Citing cases.)

Pedersen v. Dundon, 220 Fed. 309, 311 (C. C. A. 9).

Second, that the switch in the Fawn game may be considered the metallic contact member, and the extension of the fingers to overbalance them and hold them down when once depressed can be considered as a second member.

Third, the word “means” in claim 3 must be construed more broadly than the corresponding word “relays” in claim 1 (not in issue) and such word “means” comprehends an overbalanced or self-weighted switch as an equivalent.

Foreseeing this analysis, appellant argues that such a construction of the claim to make it cover the Fawn game brings it into the prohibited area of the Nakashima reference because Nakashima holds his switches down to keep

the lamps energized. Aside from the fact that the Nakashima game is entirely different, as already described, and therefore does not compel Gibbs' "means" to be regarded as the crux of his invention, appellant's argument falls of its own weight when attention is called to the following fact: Nakashima causes the balls to lodge in the pockets on his switches and *the balls hold them down*, whereas in the Fawn game, as in Gibbs', only one ball is played over and over, and the *fingers on the switches* by the weight of their overbalanced condition when once depressed hold the Fawn switches down.

The Gibbs element defined as "means" is thus seen to be absent from Nakashima, and present in Fawn.

The second element of claim 3 which appellant argues is absent from Fawn is the "electric circuit common to all of said groups" and open until all of the indicators in one of the [win] groups have been energized. We fail to follow this argument. The Fawn game has a win circuit *comprehensive* of and therefore common to all of the [win] groups and this circuit is open until all of the indicators in one of the [win] groups have been energized. Exactly the same result is achieved in both games, the winning unit remains lighted, a signal lamp flashes on, and the non-winners are cut off.

The use of a pin and bar arrangement in the Fawn games to trip a mercury switch which sets up or conditions the win circuit, instead of using a relay for the purpose as illustrated in the Gibbs patent, does not avoid infringement of the claims in suit.

In *Mills Novelty v. Monarch Tool*, 76 F. (2d) 653, 25 USPQ 225 (C. C. A. 6), the defendant had infringed a patent on a circuit-controller for automatic musical instruments. The defendant then modified its device to

eliminate a mechanical coin-actuated control, and employed an electrically (magnet) actuated control. The Court held this to be equivalent, saying:

“The claims of the patent in suit are not limited to a circuit-controller mechanically operated. It is quite true that the specification recites mechanical operation as one of the objects of the invention, and the use of electric current as a disadvantage to be avoided. This, however, is not its sole object. While the claims are to be read in the light of the specification, to ascertain their true meaning, they are not thereby to be expanded or limited. *Permutit Co. v. Graver*, 284 U. S. 52; *Chicago Forging & Mfg. Co. v. Bade-Cummins Mfg. Co.*, 63 Fed. (2d) 928 (C. C. A. 6). There is no limitation in any of the claims of the patent in suit with respect to the means by which the escapement mechanism may be actuated or the tripping lever pivoted. We may not read limitation in them. Nor is infringement avoided merely because all of the objectives of the patent are not achieved. *Telescope Cot Bed Co. v. Gold Medal Camp Furniture Mfg. Co.*, 229 Fed. 1002 (C. C. A. 2).”

When we come to the “new” Fawn game, we find identical comparative elements as discussed above. They have not been changed in any way.

However, appellant discovers another element to be missing, namely, “supplemental means for indicating a winning play when all of the indicators in one of said [win] groups have been energized. He admits that his signal lamps of the original game fulfilled this definition, but because he altered the game by unscrewing the bulbs says that he now has no supplemental means.

He ignores the rule pointed out above, that the claims of a patent are to be distinguished. Applying this rule, we call the Court's attention to the corresponding feature closely defined in claim 2 (not in issue) as "a master signal." It is obvious upon inspection that "supplementary means for indicating" is a broader term. No such things as a *master signal* lamp or bell are required. **The appellant employs a relay which makes an audible clicking sound and flickers the lights in the winning unit.** His excuse that this occurs because he uses cheap relays is feeble indeed. It is what elements are present, and how they operate, that controls, not the reasons why he does not employ something which would not infringe.

The fact that the relay which makes the noise and flickers the lights *is located in* the circuit common to all of the groups referred to above, does not avoid infringement. The same relay is, and has to be, also located in another circuit from which it derives its actuating energy. The presence of the relay, and its operation when energized by the completion of a win group, constitutes a supplementary means for indicating a winning play. In showing one to be equivalent to the other, it is not necessary that the infringing elements, especially if they are electrical circuits, can be matched by superimposing a diagram of one over the other and finding no deviation. Such would hardly ever be possible. It is sufficient that the purpose, result and means are similar.

Claim 6 is said by appellant (Brief p. 71) to cover the interconnection of a group of the Gibbs game units defined by claim 3. In a general way this is true, but claim 6 is more specific than a mere grouping of such units in that it calls for "means whereby when all of the indicators in any group of any one of said units have

been operated to complete a winning play, the indicators on all of the units except the winning unit will be deenergized, while the indicators at the winning unit will remain energized, for the purpose described.”

This element is primarily the circuit which is established upon a win combination, a relay in which cuts off the non-winning enunciator light circuits and maintains the win unit enunciator lights energized.

The identical element is present in the old Fawn game.

Claim 7 adds to claim 6 an *independent* supplementary signal at each of the units for signalling a winning play to the players.

This signal may be identified as the signal lamp on top of each unit, which is present in the patent game, and was also present in the old Fawn game.

Claim 8 builds upon claim 7 means under the control of an operator for opening and closing the circuits of all of the units simultaneously at will.

This means is a master switch, present in both the patent and in the old Fawn game.

Claim 9 has some of the principal elements of claim 6 in that it defines a plurality of electrically connected units (of the order of claim 3), but is broader than claim 6 in the final element “means *controlled by* [emphasis added] the closing of the signal circuit of the winning unit for discontinuing the signals and opening the circuits of the indicators on all other units.”

Thus, referring back to claim 6, the transfer circuit functions *by reason of* or *by action of* the completion of a win circuit, and is constituted to perform *two* functions: *i. e.*, (1) to deenergize the non-winners, and (2) to maintain the win unit energized. In claim 9, the same general

circuit is described more broadly, and functions not by reason of or by action of the completion of a win circuit, but is *merely controlled by* a win circuit, and need be constituted to perform only *one* function, *i. e.*, to control or condition the opening of the non-winner circuits. The same meaning as “controlled by” would be properly expressed as *conditioned by*. It controls to the extent of severing the circuits and thus conditioning the win circuit to remain energized, the others to be deenergized when the time switch is thrown.

Thus, claim 9 is infringed not only by the old Fawn game, which it obviously comprehends in view of the discussion of claim 6, but is also infringed by the new Fawn game.

In this new Fawn game, the circuit which opens the non-winner circuits *is prepared or conditioned by*, and consequently *controlled by*, the win circuit or circuits. The time switch, which is merely an accessory, may delay the action, but when a pre-determined time elapses, the cut-off circuit functions under the control of the win circuit or circuits. Claim 9 is thus clearly infringed by the new Fawn game.

Claim 10 adds to claim 9 the audible signal, present in both Fawn games, and thus is infringed by both.

(b) Appellant Faulkner Deliberately Imitated and Appropriated the Principles of the Gibbs Inventions.

Faulkner set out to build a game similar to Loof's, which was on the pike at Long Beach [Tr. 93]. Loof was a deliberate infringer as admitted by his associate Wiser [Tr. 80], and the consent judgment in *Gibbs v. Loof* [Tr. 355-357], and Faulkner set out to copy Loof.

Appellant concedes in his brief, page 16, that testimony to this point was admitted by the Court but says that it fell short of proving Gibbs' contentions. But there is ample testimony, witness Douglas Wiser [Tr. 80 *et seq.*], witness (appellant) Todd C. Faulkner [Tr. 93], stipulation of appellant's counsel [Tr. 93], and the trial court's comment [Tr. 201]. There is *no* evidence to the contrary.

(c) The Law Supports Appellee's Contention That Appellant Has Infringed.

The trial court made a finding that claims 3. and 6 to 10 are infringed by the "old" Fawn game, and that claims 3, 9 and 10 are infringed by the "new" Fawn game, Finding XIV [Tr. 38]. The Court's finding as to Faulkner's derivation of the game from the Gibbs patent is Finding XIII [Tr. 38].

These findings are supported by substantial evidence, and should not be disturbed.

The Gibbs patented game is not physically before this Court, and only a portion of the Fawn game is physically present. While some of the evidence revolves around the copying of the Gibbs game by Faulkner, much of it has to do with technical interpretations of electrical circuits, explanations of their operation, the effect of changing a terminal connection of a wire, and the effect of adding an electric time switch as an accessory.

Under such circumstances the findings of the District Court should be accorded much weight. This rule, and other pertinent points are discussed at length in *Stuart Oxygen Company Ltd. v. Josephian*, 162 F. (2d) 857, 74 USPQ 117 (C. C. A. 9), decided June 18, 1947, by Judges Stephens, Healy and Bone, opinion by Judge Bone.

Concerning the rule as to the weight of findings of the trial court to be accorded by the Circuit Court of Appeals, the opinion discusses this point as follows:

“The material and decisive question presented and argued before this court is whether appellant’s device infringed appellee’s patent. Appellee relies upon *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 9-Cir., 151 F. 2d 91, 95 [66 USPQ 396, 400], and urges upon us the rule there expressed that questions of infringement are questions of fact, and therefore in accordance with the Federal Rules of Civil Procedure, Rule 52 (a), this court will not set aside the determination of the trial court unless it is ‘clearly erroneous.’ However, an examination of the Brodie case and the cases therein cited discloses that Judge Mathews made an application in the Brodie case of the correct rule earlier enunciated in *Nicholl, Inc. v. Schick Dry Shaver*, 98 F. 2d 511 [38 USPQ 510] (referred to in the Brodie case) where he set forth the rule and exception in the following terms [38 USPQ at 512]:

‘The question of infringement was in this case, as it usually is a question of fact. *Reinharts v. Caterpillar Tractor Co.*, 9 Cir., 85 F. 2d 628, 630 [31 USPQ 264 at 266]. The case does not, as claimed by appellant, fall within the rule that, where the facts are undisputed, and the case can be determined by a mere comparison of structures, and extrinsic evidence is not needed for purposes of explanation or to resolve questions of the application of descriptions to subject-matter, the question of infringement may be determined as a question of law. *United States v. Esnault-Pelterie*, 303 U. S. 26, 30 [36 USPQ 212, 214].’ (Emphasis supplied.)

“(1) The testimony before the trial judge revolved around the exhibits (full size commercial units) and embraced a discussion of the meaning of the term ‘stability’ as used in the claims in the patent, the absence or presence of prior art, and appellee’s charge that appellant deliberately copied his device. The terms of the patent and the respective devices of the parties are also before us for our inspection. The facts are clear and undisputed and the question of infringement in this case can be determined by a comparison of structures and is a question of law. Therefore this court will examine for itself the device of appellant and determine as a matter of law whether it infringes the patent of appellee.”

While the issue of infringement here will stand the test of examination by this Court, we think that the circumstances bring it within the rule of the *Brodie* and the *Nicholl* cases, *supra*, because extrinsic evidence is needed for purposes of explanation or to resolve questions of the application of descriptions to subject-matter.

If this Court prefers to determine as a matter of law whether the appellant infringes, we rely upon our explanation of the similarities between the Fawn games and the Gibbs patent claims in suit, and the elementary rule of the doctrine of equivalents which needs no citation to this Court.

As to the copying of the Gibbs game by Faulkner, the *Stuart Oxygen* case is also in point. In that case the validity of a patent on a tank truck was sustained and infringement found. The infringing device was manufactured for the defendant by a mechanic who had made the plaintiff’s original model of the patented device, and who later left the plaintiff under strange circumstances

and went to work for the defendant. Thus the defendant had made for him an infringing device by one who had knowledge of the patented apparatus.

While this Court made no legal point in its opinion, based upon this fact, it evidently considered the fact sufficiently pertinent to refer to the same in its opinion. Consequently, in the case at bar the intentional and deliberate copying of the Gibbs game apparatus by Faulkner through the services of one Hatherell is pertinent here. Hatherell was assigned by Faulkner the job of making a game apparatus like the Loof game on the Pike of Long Beach. The Loof game was an infringement of the Gibbs patent.

This Court will not be misled by any argument of appellant to the effect that the derivation of the accused device is not material. Such law applies to one who claims to be an innocent infringer and the doctrine is that infringement is not avoided because a defendant had no knowledge that he was infringing.

Regarding appellant's addition of the electric time switch, and removal of the separate win signal lamps, one who appropriates the substance of a patented invention cannot avoid a claim of infringement by deliberately impairing the function of one element without destroying the substantial identity of the structure, operation and result.

Clarage Fan Company v. B. F. Sturtevant Company, 148 F. (2d) 786, 65 USPQ 203, 207, (C. C. A. 6). Certiorari denied. 326 U. S. 727, 67 USPQ 359.

Another case in point here is *Minnesota Mining & Manufacturing Company v. International Plastic Corporation et al.*, 159 F. (2d) 554, 72 USPQ 97 (C. C. A. 7),

decided January 9, 1947. The Circuit Court of Appeals for the seventh circuit in sustaining and holding infringed a patent on adhesive sheeting referred to several points which adequately answer Faulkner arguments in the present case. First, the fact that defendant's article might be an improvement does not avoid infringement. Consequently, whether or not the addition of the electric time switch by Faulkner in his altered FAWN game is or is not an improvement is inconsequential. Second, commercial success should not be ignored; and third, concerning the weight given to the findings of the District Court held that if the fact finding is supported by evidence and given by the Court it becomes a finding of the Court regardless of its author being the prevailing party's attorneys, and the appellate court is bound to consider it. In that connection the Court of Appeals said:

“(5) This defendant further contends that, because the court ‘without any supplementing opinion, signed and entered findings of fact and conclusions of law substantially identical to those submitted by plaintiff's attorneys’ this defendant ‘is entitled to consideration of this case by this court * * * as that no findings of fact had been made by the District Court.’ We know of no such law. If a finding of fact is supported by the evidence and given by the court, it thereby becomes the finding of the court, regardless of its author, and we are bound to consider it. We think these findings are amply supported by the evidence.”

Finally we cite this Court's decision in *McCullough v. Kammerer Corp.*, 138 F. (2d) 482 (C. C. A. 9): certiorari denied May 8, 1944. 322 U. S. 739, 88 L. Ed. 1573.

That case was tried by Judge Yankwich, who tried the case at bar. His opinion, holding valid and infringed

a patent covering a device for cutting pipe in the well and removing cut-off sections of pipe, is reported at 39 Fed. Supp. 213. This Court affirmed the decision.

The patent was for a combination of elements which as separate elements could be found in the prior art. The combination was held to be new, the tool achieved commercial success, the defendant learned the art while in the employ of one of the plaintiffs, and the accused tools took the substance of the patent.

In the case at bar the Gibbs patent is for a combination of elements some of which as separate elements can be found in the prior art. The Gibbs game, as a combination, is new, it has achieved commercial success, Faulkner learned the art by copying an infringing game, and in so doing took the substance of the patent.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Los Angeles, California,
May 14, 1948.

No. 11,667

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

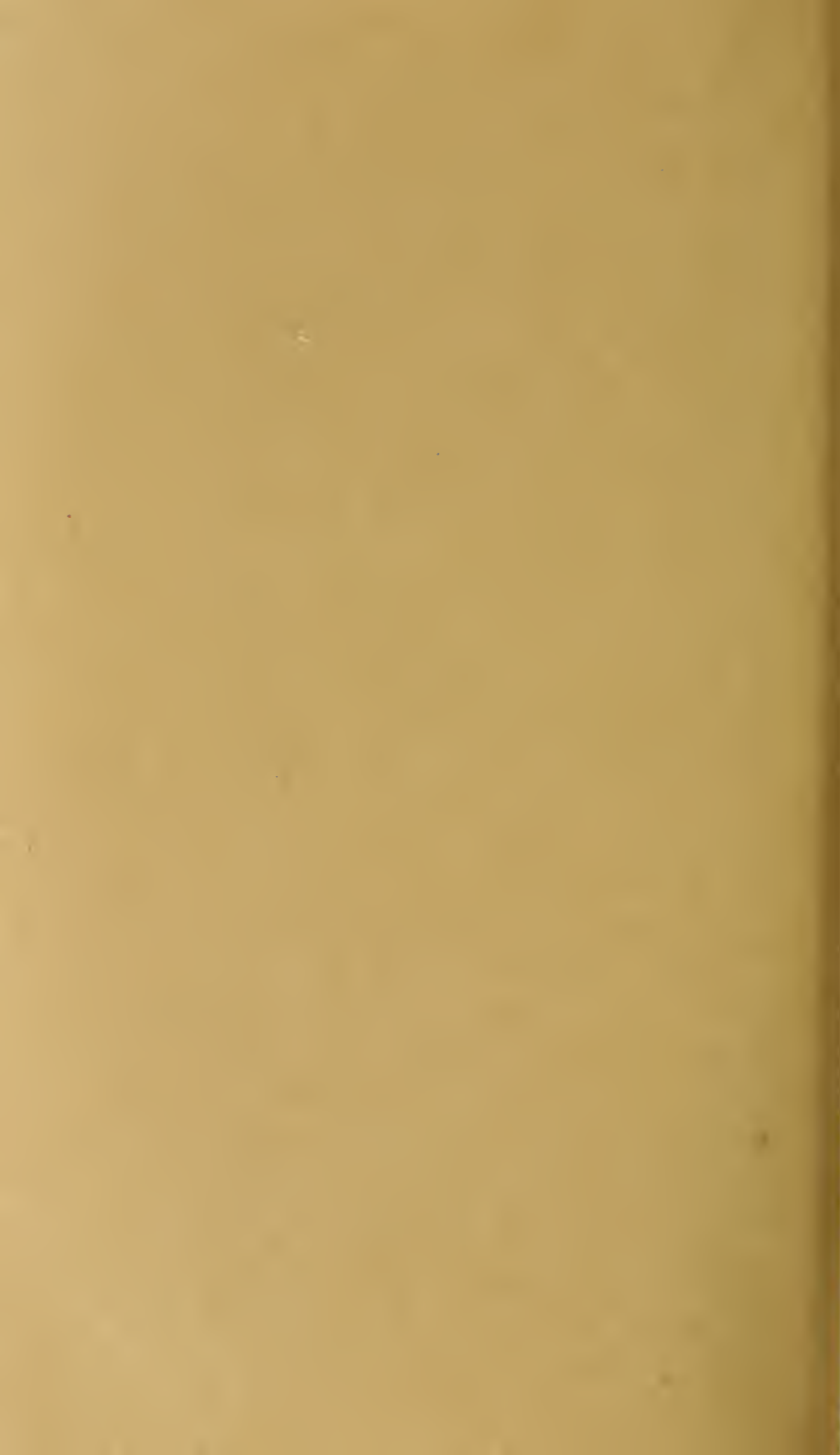
Appellee.

APPELLANT'S REPLY BRIEF.

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MAY 28 1948



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APPELLANT'S REPLY BRIEF.

Appellee's Brief is noteworthy principally for its avoidance of the real issues in this case. Nowhere in his statements or arguments does Appellee face the fact that the scope of a patent is determined by its claims. [See Law Points 1, 3 and 4, pp. 16, 17, 18, 19, Appendix to Appellant's Opening Brief.]

With respect to the footnote on page 1 of Appellee's Brief we state the following:

This case was filed in August, 1946, and Mr. Desmond, an attorney engaged in general practice, represented Appellant at that time. In September at Appellant's invitation, the attorneys for Appellee visited Appellant's place of business, inspected the two Fawn games he had there, and examined, photographed and sketched one of them, both inside and out. Only the exterior of the other game was observed. The attorneys for Appellee prepared and Appellant stipulated to, a description of the game examined, which material was used by Appellee on his motion for a preliminary injunction. In December Mr. Fulwider came into the case

Appellee deals largely in generalities and inferentially asks the Court to “read into” his claims various things to make them valid, and then to “read out” of the claims various other things to find infringement. He ignores numerous points made in our Opening Brief, and as to others he merely states a contrary position without assigning reasons therefor.

Appellee seeks to avail himself of Rule 52(a) of the Federal Rules of Civil Procedure (as all appellees with vulnerable cases do) and requests this Court to affirm the judgment below, if there is any shred of evidence at all in support thereof. This is of course contrary to the spirit of the rule and to the long line of cases construing the similar Equity Rule.

Appellee also leans heavily on the *T. Z. R.* case, the consent decrees and his licenses, but as will be pointed out later, none of these factors carry any weight in this case.

We will discuss in detail, but as briefly as possible, these various points raised by Appellee’s Brief.

for the trial. The issues were already framed except for the matter of the new Fawn game which was, at Appellant’s instance, later injected into the case. After Appellant’s Brief was filed it was discovered as the result of depositions on accounting that there were some differences between the above-mentioned game examined in detail by attorneys for Appellee and the one they had merely observed. Neither of the attorneys for Appellant had any knowledge of these differences prior to their said discovery. Appellee states that Appellant concealed the facts. Appellant states that there was no concealment and that Appellee’s attorneys could have examined the inside of the other game if they had so requested. Mr. Desmond, who was present at the inspection, has no recollection of any conversations concerning an examination of the other game, and Mr. Fulwider was not present, as he was not then in the case. We do not see that the matter is material in the slightest but submit the foregoing because Appellee for some reason has seen fit to mention the matter.

I.

No Presumption of Validity Attaches Under F. R. C. P. 52(a) to the Findings or Conclusions of the Trial Court in This Case.

A substantial portion of Appellee's Brief is devoted to the thesis that great weight should be attached to the Trial Court's Findings of Fact in this case. That portion of Rule 52(a) which is pertinent to this contention reads as follows:

"Findings of Fact shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*"

The first clause of the above sentence is often quoted, but the second clause is seldom included. While the two clauses are stated in the conjunctive, the second clause is really *explanatory* of the first.

It is submitted that if the words in Rule 52(a) "and due regard shall be given" were changed to read "*since due regard should be given,*" the sentence in question would better state the true equity rule long applied by the courts.

A proper application of Rule 52(a) was made by this Court in the case of *Stuart Oxygen Company, Ltd. v. Josephian*, quoted in Appellee's Brief at pages 30 and 31 thereof, in which case the Court examined the evidence for itself under the doctrine of *United States v. Esnault-Pelterie*, 303 U. S. 26, 36 U. S. P. Q. 212.

Construing a patent is essentially no different from construing any other contract, and where the bulk of the evidence consists of documents such as prior patents, photographs, drawings, depositions and the like, the Appellate

Court is not required to give any weight to the Findings of the Trial Court. This rule was followed by this Court in the case of *Equitable Life Assurance Society of the United States v. Irelan*, 123 F. (2d) 462, 5 Fed. Rules Serv. 610, where Judge Healy stated as follows:

“Since all testimony bearing on the circumstances antecedent to and surrounding her death was by *deposition*, the Finding of accidental death, while it is justly entitled to consideration, *has not the weight we would otherwise be obliged to concede to it*. This Court is in as good a position as the trial court was to appraise the evidence, and we have the burden of doing that. * * * as is well known, in the Federal courts where the testimony in equity or admiralty cases is by depositions *a reviewing court gives slight weight to the Findings*.” (Emphasis added.)

The same rule was well expressed by the Seventh Circuit Court of Appeals in considering the weight to be accorded to the Master’s Findings in the case of *Carter Oil Company v. McQuigg*, 112 F. (2d) 275, 3 Fed. Rules Serv. 503, in which decision Judge Evans stated:

“Where the question is one of veracity it is clear that the appellate court should give controlling weight to the trier of fact who saw and heard the witnesses. This is well established. *Where the testimony consists of documentary evidence and depositions*, a Master is in no better position to determine an issue of fact than a reviewing court. The District Court’s Finding on such evidence is likewise subject to free review, *unaffected by presumptions* which ordinarily accompany their Findings on controverted issues.” (Emphasis ours.)

and see the quotation from the *Stuart Oxygen Company* case on pages 30 and 31 of Appellee’s Brief.

No extrinsic evidence need be considered in the decision of this case. The whole record of the Trial Court is before the Appellate Court with ample illustrations and descriptions of the devices in question. There is no conflict between the parties with respect to the construction of the Gibbs and Fawn games. The case turns solely on the construction to be given to the claims in suit and to the showings of the prior art patents.

Thus this case comes squarely within the doctrine enunciated in the above-quoted cases, and particularly the *Stuart Oxygen* and *Nicholl* cases quoted in Appellee's Brief, to-wit, that the reviewing court is not bound by any presumptions of validity or correctness of the lower court's Findings or Conclusions.

The fact that Appellee here has found it necessary to so strongly urge the contrary view is a clear sign of weakness on his part.

II.

The Decision in *Gibbs v. T. Z. R. etc.* Is Neither Persuasive nor Helpful in This Case.

The Appellee lays great stress on the New York District Court case of *Gibbs v. T. Z. R. Amusement Corporation*, 14 Fed. Supp. 597, 29 U. S. P. Q. 518, decided in 1936, and seeks to draw a parallel between the facts therein and the facts of the case at bar. However, a careful reading of the *T. Z. R.* case shows that the facts were totally different, there being no real contention of non-infringement. The Court stated that:

"The Defendant's device is *so like* the Plaintiff's that little or no contention is made on the subject of infringement;"

This is obvious from the fact that *all* of the claims of the patent were in suit and were held to be infringed. Since claims 1, 2, 4 and 5 (not in suit here) were all specifically limited to relays, armatures and momentarily operated contact switches, it follows that the Defendants' game must have been practically identical to the Gibbs game.

The New York Court therefore was not called upon to interpret the Gibbs claims since even the narrowest ones were infringed. Likewise, Gibbs was not faced with the problem, as he is here, of having to mold his claims one way to find infringement and another way to make them valid.

When arguing the prior art, such as Nakashima for example, Gibbs in the *T. Z. R.* case could point to his relays and momentarily opened contact switches as distinguishing features, and since these same elements were in the *T. Z. R.* apparatus there was no need for Gibbs to ask the Court for a broad construction of his claims.

The *T. Z. R.* decision is not necessarily inconsistent with Appellant's position in this case, for it is thought that if Judge Byers had had the Fawn games and the *prior art cited in this case* before him, he would have found no infringement. Whether or not he would have found invalidity we cannot now say, although from the scarcity of good prior art cited and the tone of the decision it does not appear that the *T. Z. R.* case was very vigorously defended.

The only multiple-unit game patent mentioned by the Court in the *T. Z. R.* case was Irsch No. 1,433,888 which is so poor a reference that we did not even plead it in this case. This is the Irsch patent mentioned on page 8 of Appellee's Brief and is not to be confused with Irsch

1,458,884 used by Appellant herein as prior art. If Judge Byers had had the benefit of the Prina, Chester, Higuchi, Irsch 1,458,884, and Wallace patents, *all illustrating competitive games having the cut-off later used by Gibbs*, it is quite likely that he would not have been so impressed with the Gibbs game. Certainly his decision would have been written in quite a different vein since these prior art patents negative many of the advantages and novel features mistakenly attributed by the Court to Gibbs. It is felt that on the basis of this additional art Judge Byers would probably have held claims 6 to 10 invalid, and possibly claim 3 also.

Appellee also seeks to draw a parallel with the *T. Z. R.* case by inferring in his brief that because Faulkner permitted a Preliminary Injunction by default there is no real contention on the question of the infringement of the old Fawn game. However, this is clearly not the case as seen from our Opening Brief. If the obvious needs restating, we hereby affirm that we are most seriously and sincerely contending that the old Fawn game does not infringe!

III.

Consent Decrees and Licenses Cannot Make an Invalid Patent Valid.

Appellee relies strongly on the various consent decrees which he had heretofore secured and on his alleged commercial success. However, consent decrees are entitled to but little weight as they are merely evidence that the Defendants therein did not wish to go to the expense of a lawsuit.

With respect to the various licenses granted by Gibbs, it is admitted that he has had some commercial success,

but that success has not been such as to in any way affect the issues of this case.

Commercial success can only tip the scale in favor of validity when the evidence for and against the patent is evenly balanced, and then, only when the commercial success is phenomenal and the art has long been searching for a solution to the problem.

IV.

The Claims in Suit Are Invalid; and Are Not Infringed by Either of the Fawn Games.

A. Appellee's Brief Does Not Discuss the Game Described by the Claims in Suit, but Instead, What Appellee Terms the "Essence" of His Patent.

Appellee's contentions with respect to validity are epitomized by the wistful statement on page 20 of his brief that:

"he (Gibbs) can properly be found to have invented *something*." (Emphasis added.)

But Appellee studiously avoids reference to his claims in telling us what he allegedly invented.

Instead of discussing the invention defined in his claims, the Appellee expatiates on what he terms the "essence" of his invention and fashions a definition thereof that does not correspond to any claim in his patent.

In his discussion of validity Appellee infers that all of his claims include the cut-off circuit and states that in the Gibbs game the non-winners are cut-off "at the termination of a playing period *as determined by an electric time switch*." Both the inference and the statement are incorrect. Claim 3 does not recite the cut-off feature at

all, and there is no teaching whatsoever in the Gibbs patent of a time clock apparatus or method of play!

In his discussion of infringement the Appellee infers that all of his claims include a single ball, holes in the board, and the non-winner cut-off, but a reading of the claims shows this not to be true.

When discussing claims 6 to 10, Appellee borrows generously from the specification and drawings and ignores the prior art. In attempting to minimize the effect of the multiple-unit prior patents he states at page 14 that they

“are apparently relied upon by Appellant on the proposition that each of these patents provides an electric circuit open until a win has been made and that when there is a winner a light lights or a bell rings.”

This, however, is *only one of the features* for which these patents are cited. As clearly documented in our Opening Brief, each of these prior patents shows a *multiple-unit competitive game* in which when a win is made on one unit a signal is operated *and all of the other units are automatically disconnected*.

In relying upon what he terms the “essence” of the Gibbs invention instead of the claims, the Appellee asks this Court to read *certain things into* the claims to find validity and then to read *certain other things out* of the claims to find infringement. This has been condemned by the Supreme Court in very apt language in the case of *White v. Dunbar*, 119 U. S. 47, 51, as follows:

“Some persons seem to suppose that a claim in a patent *is like a nose of wax which may be turned and twisted in any direction*, by merely referring to the

specification, so as to make it include something more than or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; *but not for the purpose of changing it and making it different from what it is.* The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and *it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms.* This has been so often expressed in the opinions of this Court that it is unnecessary to pursue the subject further.” (Emphasis added.)

B. Claim 3 Is Anticipated by Nakashima, Is Invalid for Lack of Invention, and Is Not Infringed by Either Fawn Game.

Appellee infers on page 10 of his Brief that Appellant has shifted ground and is now urging additional patents as anticipatory of claim 3. This is not the case, however, as a simple inspection of our Opening Brief will reveal. Nakashima was urged at the trial and is still urged as anticipatory of claim 3. The other board-and-ball patents used against claim 3 go to show lack of invention.

The Prina patent was pleaded and is urged as anticipatory of claim 6 because this claim is not limited by its terms to a board-and-ball game, but comprehends any multiple unit game employing indicator lights.

Appellee seeks to minimize the prior art patents cited against claim 3 by stressing minor differences between the games therein disclosed and the Gibbs game. However, most of the points of difference mentioned by Appellee refer to features not included in the Gibbs claims.

For example, Appellee stresses that Nakashima and some of the other prior patents show single unit games utilizing a plurality of balls. However, claim 3 is only directed to a *single unit* and does *not* specify any number of balls to be used in the play. Claim 3 is totally silent as to what means is used to operate the annunciator contact devices. As a matter of fact, claim 3 does not even specify that the playing board has holes in it or that the contact devices are underneath the holes.

Further inconsequential points of difference are illustrated by Appellee's mention with respect to Hayashi that his playing board is inclined downwardly instead of upwardly and that the objects which he moves across the board roll in a zig-zag path. Again, however, attention is called to the fact that there is nothing in claim 3, nor for that matter in any of Gibbs' claims, specifying the tilt of the playing board or the path of the objects moved thereacross.

With respect to Esmarian the Appellee remarks that the only balls which are returned to the player for re-rolling are those which have not entered a pocket. But again it is to be noted that claim 3 says nothing about any balls passing through any pockets. Appellee also mentioned in this connection that Esmarian does not show an annunciator panel wherein horizontal, vertical or diagonal lines of lights can be energized to create a winner. But again we observe that none of the claims of the Gibbs patent specify either the number of lights in his annunciator panel or how they are arranged.

With respect to Nakashima Appellee makes the bald statement appearing at the top of page 24 that the "Nakashima game is entirely different." But the only

difference in so far as claim 3 is concerned between the Gibbs and Nakashima games is that Nakashima energizes his indicators by keeping his contact devices closed, whereas Gibbs energizes his indicators by relays which are operated by the momentary closing of his contact devices. This feature of the Gibbs game is defined in claim 1 (not in suit) as follows:

“a plurality of relays in the circuit of said indicators adapted to be energized when a ball is dropped through said apertures into engagement with said contacts, * * * whereby when each of said contacts has been momentarily operated by said ball, said relays and said indicators will be energized.”

Because of the above limitations in claim 1, it is not anticipated by Nakashima, but in claim 3 this structure is broadly stated (see claim outline on page 20 of our Opening Brief) as

(f) “*means* for energizing said indicators as the associated contact devices are operated.”

As was said in the *Halliburton v. Walker* case, 67 Supreme Court 6, 75 U. S. P. Q. 175, claim 3 uses

“conveniently functional language at the exact point of novelty.”

In the *Halliburton* case the penalty paid by the patentee was invalidity of his patent. A similar ruling is even more justified in this case since the broad words “means for energizing” read literally on Nakashima.

Our position with respect to Claim 3 is that when *literally construed*, it reads fairly and squarely, element-by-element, upon Nakashima (see pages 23 to 25 of our Opening Brief) *but not on either Faxon game*. By its

plain terms, claim 3 calls for two elements present in Nakashima but not present in either of the Fawn games. (There is also a third element missing in the *new* Fawn game which will be discussed later.)

Since there is no literal infringement of claim 3 by the old Fawn game, Appellee has been compelled to expand this claim by urging the doctrine of equivalents. But as expanded, claim 3 reads even *more clearly* on Nakashima.

(1) THE FIRST ELEMENT OF CLAIM 3 OMITTED IN EACH
FAWN GAME.

Claim 3 (see outline, page 20 of our Opening Brief) includes among other things:

(b) “a plurality of *contact devices*”;

(c) “a plurality of *indicators*”;

and

(f) “*means for energizing* said indicators as the associated *contact devices* are operated.”

These three elements of Claim 3 clearly describe the Gibbs type of game in which the contact devices (b) are momentarily closed to operate means (f) for energizing the indicators (c). Not only are the *contact devices* and *energizing means* thus separately stated as individual elements (b) and (f), but their individuality is accentuated by the fact that they are both mentioned in the same clause (f). This part of claim 3 can be rewritten for clarity as follows without in any way changing its meaning.

“Means (f) for energizing the indicators (c) as the associated contact devices (b) are operated.”

In order to find infringement in the old Fawn game, the Appellee argues that Faulkner's overbalanced switch is the equivalent of both elements (b) and (f) because, he says, Faulkner's switch remains closed to cause his indicator lamps to stay energized.

What the Appellee ignores is the fact that *Nakashima also keeps his indicator lamps energized by keeping his switches closed.*

The only difference between Faulkner and Nakashima is that the Faulkner switch stays closed by its own weight whereas Nakashima's switch is kept closed by the weight of the ball thereon. Obviously any construction of claim 3 which includes the Faulkner overbalanced switch as an equivalent *must also include the Nakashima switch as an equivalent*, and render claim 3 invalid.

On the other hand, if claim 3 is construed as the Patent Examiner undoubtedly intended, *i. e.*, as limited to separate electrical means for maintaining the indicators energized after the contact devices have been operated, then claim 3 is valid over Nakashima, but is of course still more clearly not infringed.

Still another incongruity appears from Appellee's contention that claim 3 reads on the Faulkner game, for by so doing, the Appellee of necessity adopts the Faulkner structure as his own in so far as the question of validity is concerned. In other words, when the Appellee argues that claim 3 includes the Faulkner overbalanced switch, he is, in effect, rewriting claim 3 to specify that the indicators are energized by contact devices which stay closed.

Since the only difference between Nakashima and Gibbs resides in the means for energizing the indicators, Gibbs

by adopting the Faulkner overbalanced switch as part of his claim argues that it was invention to substitute the overbalanced Faulkner switch for the switch of Nakashima.

It is apparent on the face of it that if Gibbs had presented an application to the Patent Office illustrating the Fawn mechanism, and had substituted the words "a plurality of overbalanced switches for energizing said indicators" in lieu of the present wording of claim 3, the Examiner would have promptly rejected the claim on Naskashima. Gibbs would never have convinced the Examiner that there was any patentable novelty in substituting his overbalanced switch in the Nakashima game otherwise described by claim 3.

And yet, in claiming infringement of claim 3 by the old Fawn game, Appellee asks this Court to rule that it was patentable invention to substitute the Faulkner overbalanced switch arm in the Nakashima game.

(2) THE SECOND ELEMENT OMITTED FROM CLAIM 3
BY EACH FAWN GAME.

In Appellant's Opening Brief (pp. 69, 70) we pointed out that element (g) of claim 3 is likewise omitted from each of the Fawn games since neither the old nor the new game has "an electric circuit common to all of said groups." In answer to this, Appellee states that he fails to follow our argument and that the Fawn game has a win circuit which is "comprehensive of" all of the groups. However, the claim does not say "comprehensive," it says "common," and on the face of it, one circuit cannot be common to a plurality of other circuits unless it is electrically connected or connectable thereto. This wording was inserted

in claim 3 by amendment to meet the objection of the Examiner, and Appellee is bound by said wording.

As Appellee mentions, the same *result* is achieved in the Gibbs game and the old Fawn game when a win is made, but this is not the test of equivalency. Appellant had a perfect right to accomplish the result of Gibbs by using *different means*, which he has done. A simple examination of the wiring diagram of the old Fawn game shows that Appellant's win circuit is not common to any of the annunciator light circuits as is the case in Gibbs.

The law was correctly stated in the *Mills Novelty* case quoted by Appellee on page 25 of his Brief in which case the Court said that patent claims are to be read in the light of the specification, *but are not to be expanded or limited thereby*. When this element of Gibbs is read in the light of the specification, it is clearly apparent that the word "common" (suggested by the Examiner) means "electrically connected or connectable" and does not include a mechanical arrangement such as present in the Fawn game.

It is therefore submitted that both the old and the new Fawn games avoid infringement of claim 3 by omitting (1) the separate energizing means of Gibbs, and (2) by not having a win circuit "common" to the group circuits.

Attention is also called to pages 26-32 of our Opening Brief which bring out clearly the fact that claim 3 besides being anticipated by Nakashima, is invalid as lacking invention over Nakashima and the other prior art patents. This defense was not mentioned in Appellee's Brief and hence we have nothing to reply to here on that score.

Attention, however, is particularly directed to the Wallace patent which shows ball rolling game units connected in the same fashion as Gibbs.

(3) THE NEW FAWN GAME ADDITIONALLY AVOIDS CLAIM 3 BY OMITTING THE GIBBS SUPPLEMENTARY WIN SIGNAL.

As above pointed out, *both* Fawn games avoid claim 3 by the omission of elements (f) and (g) thereof and hence do not infringe.

Additionally, as brought out in our Opening Brief (pp. 58-64), the *new* Fawn game *further avoids infringement* of claim 3 by completely omitting the last element thereof, to-wit:

“supplementary means for indicating a winning play when all of the indicators in one of said groups have been energized.”

As pointed out by Appellee on page 25 of his Brief, the old Fawn game had this element present in the signal lamps on top of the annunciator panels. However, the new Fawn game does *not have any signal lamps* and consequently this element is completely missing.

Appellee urges that the *supplementary means for indicating a win* in claim 3 must of necessity be something different from and broader than the “master signal” recited in claim 2 because, the Appellee states, claim 3 must be distinguishable from claim 2. However, even a cursory examination of claim 2 shows that it is much narrower in many respects than claim 3 without regard to the win signal element.

A fair reading and comparison of these two claims and a fair reading of the specification (see pages 60, 61

of our Opening Brief) leaves no doubt as to what Gibbs and the Patent Office had in mind when claim 3 was allowed. The last element of claim 3 obviously refers to a win lamp or other *means for signalling a win*, not only to the player of that particular game unit, but also to the other players and the operator.

Appellee has in his Brief finally committed himself to the *click and flicker*, *i. e.*, to the position that the *incidental click* of Appellant's transfer relay and the *momentary flicker* of the annunciator lights due to their power being shut off for the fraction of a second taken by the relay arm in moving from one position to the other, is the full equivalent of the *supplementary signalling means* of claim 3.

The familiar and well known rule of equivalents (see Law Point 7, Appendix, p. 23, Appellant's Opening Brief) is, that to be an equivalent, a device *must perform the same function in substantially the same way* (not just a *similar* function in a *similar* way as stated by Appellee).

However, even by Appellee's own rule of equivalency stated on page 26 of his Brief, that the *purpose, result and means* must be similar in order to have an equivalent, there can be no infringement of claim 3 by the new Fawn game.

Appellant's relay is *solely for the purpose* of setting up a transfer circuit, so that when the *time clock subsequently opens the main power switch to all the game units*, the annunciator lights on the winning game unit will not be shut off. The relay has no purpose or function whatsoever of indicating a win. Even a cursory examination of Exhibit J [R. 535] and a reading of the description of the new Fawn game at pages 10-13 of

the Appendix of Appellant's Opening Brief shows this to be the fact.

Likewise, the *result* is not the same (or even similar) since the normal click of the relay and momentary flicker of the annunciator lights incident to the operation of the relay are not at all comparable to the continuous glow of a signal lamp which notifies not only the winning player but also all of the other players and the operator that a win has been made.

Appellee's own expert, Mr. Burke, testified at R. 123 with respect to the "click" that:

"I doubt if it could be heard by any of the players, except the one above it."

and further at R. 141, we find the following:

"Q. The average relay that they put in a game of that type would be bound to have a little click? A. (By Mr. Burke): That is correct."

To say then, that in a room where there are sixteen game units being played by sixteen people rolling balls which are dropping into holes and causing lights to come on, the incidental click of a relay on one game unit which can only be heard by that player, and a momentary flicker of its lights incident thereto accomplishes the result of *signalling a win* to the sixteen players and the operator (behind the games where he cannot see the flicker) is ridiculous on its face.

Lastly, the *means* are obviously not the same. There is absolutely no similarity between a *relay located under the game board* and a *signal lamp located on the top of the annunciator panel*.

For Appellee to argue otherwise is to do violence to the plain and simple meaning of the words of the claim, and the description in the specification.

The click which Appellee contends amounts to a signal is, of course, normal to any relay unless it is a very expensive and complicated one. Consequently, any game employing multiple units and relay cut-offs, such as Prina, Chester, Wallace and Higuchi, of necessity will have a slight click as the relay closes and a flicker of the lights in circuit therewith. For example, the lights of Prina will flicker, and a click will be heard when the win relay is operated.

This matter of the click and the flicker is dealt with at pages 62-64 of Appellant's Opening Brief to which attention is referred for a further discussion. However, before we leave this point, the Court's attention is respectfully called to the further fact that claim 3 calls for "*supplementary*" signalling means. Appellant's relay is not, in any sense "*supplementary*," since it is the essential part of the preceding element of claim 3. The Appellee still has not told us how the relay can be *supplementary to itself*. Obviously it cannot be.

C. Claims 6, 7 and 8 Are Anticipated by Prina, Display No Invention, and Are Not Infringed by Either Fawn Game.

Appellee has completely ignored Appellant's detailed comparison of claim 6 with the Prina patent set forth at pages 37 and 38 of Appellant's Opening Brief. Furthermore, Appellee makes no argument in support of his naked assertion that claim 6 is valid. The entire discussion of claim 6 in Appellee's Brief is confined to two short paragraphs at the bottom of page 26 and the top of page 27

of his Brief, wherein he concedes that “in a general way” Appellant’s position that claim 6 is merely a group of the claim 3 units is correct.

As pointed out in our Opening Brief, claim 6 is not only anticipated by Prina but is also invalid for lack of invention, since it is not invention to merely interconnect a number of the Nakashima games of claim 3 by means of the circuits disclosed in Prina, Chester, Wallace, Irsch and Higuchi. This is particularly true since Wallace shows the use of a momentarily closed switch of the Gibbs type in a competitive board game. (Gibbs was operating a Wallace game when he conceived his own game.) It could not be invention to substitute the annunciator panel of Nakashima in the competitive board game of Wallace. This is not the caliber of thinking that amounts to invention under the law.

It is apparent that since neither of the Fawn games infringes claim 3, they likewise cannot infringe claim 6 which is merely a group of claim 3 units put together.

The Trial Court held that the new Fawn game did *not* infringe claim 6, and it should also have held that the old Fawn game did not infringe.

Since there is no infringement of claim 6 there cannot, of course, be any infringement of claims 7 and 8 dependent thereon. In this connection it is interesting to note that Appellee finds the “supplementary signal” of claim 7 in the *signal lamp* on the top of the old Fawn game, although when discussing claim 3 he contends that the absence of this lamp is immaterial.

Appellee’s observation with respect to claim 8 is clearly erroneous because in *neither* Fawn game is there a master switch under the control of the operator. In the Gibbs

game the master switch 68 (see Fig. 10) has to be operated each time the game is completed. No similar structure is found in either the old or new Fawn game. In the new Fawn game particularly, it will be noted that the starting and stopping of the game is governed by the time clock.

With respect to validity, the additions of claims 7 and 8 to invalid claim 6 are not sufficient to save these claims. This entire set of claims, *i. e.*, 6, 7 and 8, stand or fall together.

D. Claims 9 and 10 Are Invalid for Ambiguity and Lack of Invention, and Are Not Infringed by Either Fawn Game.

(1) CLAIMS 9 AND 10 DESCRIBE A GAME NOT TAUGHT BY THE GIBBS PATENT.

As pointed out at pages 45 and 46, and again at pages 74 and 75 of Appellant's Opening Brief, the elements of claim 9 are not only inconsistent with each other, but actually describe a game *different from* the Gibbs game. Appellee does not deny this fact. He cannot. His only answer to this *fact* is that the claims have not been so held in the past.

In the Gibbs game as disclosed in his specification and drawings and as *claimed in all but claims 9 and 10*, when five lights in any row (a group) on one of said game units have been energized, the remaining game units are thereupon disconnected.

But what claim 9 says, is that:

- (1) the win signal circuit is held open until five lights in a row (a group) on *each* game unit have been energized.

and

- (2) when all 25 of the lights of any game unit have been energized, the win signal circuit will be closed,

and then

- (3) the non-winning units will be disconnected.

Under the clear holdings of the Supreme Court in the cases cited in Law Point 2 of our Opening Brief, Appendix, pages 17 and 18, these ambiguous and invalid claims should not longer be allowed to plague the public.

- (2) SINCE CLAIMS 6, 7 AND 8 WERE HELD NOT INFRINGED BY THE NEW FAWN GAME, CLAIMS 9 AND 10 LIKEWISE CANNOT BE INFRINGED SINCE THEY CONTAIN THE ELEMENT OF CLAIM 6 WHICH THE TRIAL COURT FOUND NOT TO BE PRESENT IN THE NEW FAWN GAME.

Appellee argues that the time clock in the new Fawn game is merely an accessory and does not change the method of play. This is the argument advanced by Plaintiff at the trial with respect to claim 6 which the Trial Court expressly overruled.

The Trial Court found that the new Fawn game, because of its time clock, *had a different method of play and accomplished a different result from the Gibbs game.* This is a complete answer to Appellee's statement on page 3 of his Brief that "the method of play was the same as before."

Appellee takes issue with our statement that the new Fawn game is not competitive. However, again the answer to this contention is found in the Trial Court's remarks at the close of the trial where *the Court said that*

the time clock made the game non-competitive and hence removed it from the scope of claim 6.

The Appellee has not appealed these rulings of the Trial Court and they therefore stand admitted.

How then, in the face of the Trial Court's decision that the new Fawn game achieved a *different result* in a *different manner* from the Gibbs game, can the Appellee now seriously urge that the new Fawn game infringes claims 9 and 10?

The failure of the Trial Court to include these claims with claims 6, 7 and 8 as not infringed was clearly the result of a misapprehension of the facts and was probably due to the fact that in arguing vigorously against claim 6, we only touched briefly on its counterpart claim 9.

Claim 9 and its dependent claim 10 are, like claim 6, directed to a plurality of individual game units electrically interconnected. In other words, these claims are (to the extent that they are intelligible) directed to the entire Gibbs game as illustrated and described in his specification.

As set forth on page 56 of our Opening Brief, element (e) of claim 6 with its subdivision (1) broadly covers the same subject matter as elements (d), (e), (f) and (g) of claim 9. It is true as stated by Appellee that claim 9 does not specifically include element (e-2) of claim 6 that the lights on the winning game shall be kept illuminated. However, this had nothing to do with the Trial Court's decision.

What the Trial Court found, and what is an obvious fact, is that the new Fawn game does not have any part of elements (e) (e-1) of claim 6, which read as follows:

“means whereby when all of the indicators in any group of any of said units have been operated to complete a winning play the indicators on all of the units except the winning unit will be deenergized.”

It would seem too apparent for argument that element (g) of claim 9 which states:

“means controlled by the closing of the signal circuit of the winning unit for discontinuing the signals and opening the circuit of the indicators of all other units”

refers to exactly the same structure as defined in element (e, e-1) of claim 6.

Appellee does not actually state that these elements refer to different structure in the Gibbs game. He merely argues that because claim 6 recites additionally that the indicators of the winning unit remain energized whereas claim 9 only recites this inferentially that claim 9 is narrower than claim 6.

But this is no answer to the clear fact that claim 9 contains the exact element of claim 6 which the Trial Court found to be lacking in the new Fawn game. On R. 266 we find this clearly stated as follows:

“The Court (to Mr. Huebner): I don't quite get the trend of your thought. It seems to me that the latter part of that claim, the wording would not be read on the altered game, as you call it, the new game, because there is no deenergization, deenergization

does not occur, because the game goes on. In other words, in the second game, if the person win, the play goes on until the clock strikes, while in your game automatically the other players are left out in the dark, as it were, and the game stops.

“For that reason, I can’t see how this latter part can be said to be anywhere read upon it. If I understand correctly, the word ‘deenergized’ means that the electrical current which had operated on these units is off, or momentarily it does not have any effect.”

What the Court said at the trial and what the Court ruled in its decision (which is now final), was that the time clock made the new Fawn game non-competitive because the non-winning units were not disconnected when a win was accomplished but remained operative until the time clock, at some later period, shut down the game.

Appellee by tortuous reasoning tries to distinguish between claims 6 and 9 by attaching particular significance to the word “controlled” occurring in claim 9. We are told that the words “controlled by” in claim 9 really mean “conditioned by,” and that the *means* in claim 9 control “to the extent of *severing the circuits* and thus conditioning the win circuit to remain energized, the others to be de-energized when the time switch is thrown.” *This, however, is not a correct statement.*

When a win is accomplished in a unit of the new Fawn game, the annunciator lights on that game unit are transferred to an auxiliary power circuit so that when the main power line is subsequently cut by the time clock, the winning game unit will not be affected thereby. Neither the win circuit nor the transfer circuit of the winning game unit have anything to do with cutting off the other games.

It is not a fact, as stated by Appellee on page 28 of his Brief, that "the circuit which opens the non-winner circuits is prepared or conditioned by the win circuit."

The non-winner circuits are only opened by the time clock circuit and are not prepared, conditioned, controlled or affected in the slightest by any circuit in the winning unit. Appellee very evidently has forgotten how the new Fawn game operates.

Attention is respectfully called to the detailed description of the construction and operation of the new Fawn game which appears in pages 10-13 of the Appendix of Appellant's Opening Brief. As therein stated, a win on any game unit does not in any way affect the operation of the other games, it does not disconnect them, it does not prevent the other players from continuing their play, and it does not control, modify or affect the time clock or any outside circuit.

There are no means controlled or conditioned by the closing of a signal circuit of the winning unit for discontinuing or shutting off the other playing units. The other playing units are shut off solely by the operation of the time clock. The argument of Appellee to the contrary is in plain disregard of the facts.

Appellee asserts that both the old and new Fawn games infringe claim 10 which calls for an *audible* signal. Appellee does not say wherein he finds this audible signal but he must be referring to the click of the win relay previously discussed. Obviously, the click of the relay is not the equivalent of the win bell contemplated in claim 10. The court's attention is additionally called to the fact that the actual wording of claim 10 calls for an

"audible signal *commonly connected with all of said units.*"

In the Gibbs game this is the bell 69 which is commonly connected to all units and rings when *any* game unit wins.

Even if the click of the Fawn game relays could be said to be an audible signal, still they would not infringe claim 10 because it calls for that signal being *commonly connected to all of the units*. Obviously, the win relay in any individual Fawn game unit is not connected to any other unit and has nothing to do with the other units.

(3) CLAIMS 9 AND 10 DO NOT READ ON THE OLD FAWN GAME, AND IF RECONSTRUCTED AS URGED BY APPELLEE THEY STILL ARE NOT INFRINGED.

This point, which was fully discussed on pages 74, 75 and 76 of our Opening Brief, is not even mentioned in Appellee's Brief. Appellee again contents himself with the naked statement that claim 9 is infringed.

In addition to the above-noted pages of our Opening Brief the Court's attention is directed to the discussion earlier in this article under Section D-1 where we analyzed the ambiguities of claim 9. The game described by claim 9 is entirely foreign to the Faulkner games.

To the extent that claim 9 is intelligible, it merely recites a plurality of claim 3 game units and is invalid and not infringed by either of the Fawn games for the reasons heretofore advanced in discussing claims 6, 7 and 8.

V.

Appellee's Statement That Faulkner Copied the Gibbs Game Is Not Supported by the Evidence and Is Not Material to This Case.

The Appellee is still urging that Faulkner is guilty of something or other because he saw some marble games in Loeff's establishment in Long Beach and set out to build a game that was similar thereto. (Loeff then had no connection with Gibbs.) There is nothing in the record to show that Faulkner or Hatherell or any employee of Faulkner had any access to the operative parts of the Loeff games, nor is there any evidence in the case whatsoever to show that the Loeff game was a copy of the Gibbs game.

In answer to Appellee's contentions, attention is called to the testimony of Wiser quoted on pages 14 and 15 of the Appendix of our Opening Brief, and to our discussion of this issue on pages 76 to 78 of the Brief. In so far as the Loeff game was concerned Wiser testified that he never saw the inside of it and that they merely set out to copy the *method of play*. Gibbs' patent does *not* cover the method of play.

Appellee seeks to draw a parallel between this case and the facts in the *Stuart Oxygen* case and makes the flat statement that Faulkner deliberately copied the Gibbs game apparatus. *Such is not the fact.* There is no showing in this case that either Faulkner or Hatherell had any knowledge whatsoever as to the essential construction of the Gibbs apparatus, or the Loeff apparatus either for that matter.

Conclusion.

By way of summary, reference is made to the Topical Index hereof, which succinctly states our position, which is of course stated in more detail in our Opening Brief. We do not recede from any point raised in our Opening Brief.

It may be that Gibbs made an invention such as described in the narrow claims not here in suit. However, it is abundantly clear that the claims here being sued upon are invalid unless narrowly construed. Furthermore, no matter what construction is placed upon the claims they are not infringed by either of the Fawn games.

Respectfully submitted,

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No. 11,667.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

PETITION FOR REHEARING.

FILED

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IN THE

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vs.

JOHN T. GIBBS,

Appellee.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Now comes the Appellant herein and petitions this Honorable Court for a rehearing of this case on the ground that serious errors of fact and law appear in the opinion delivered October 8, 1948, which if corrected would necessarily lead to a different conclusion and a reversal of the judgment below.

By its strict adherence to the literal wording of F. R. C. P. 52(a) this Court has been led into the position of adopting as its own a decree of the lower court which as to the new Fawn game is totally illogical and inconsistent upon its face.

As this Court stated on page 2 of its opinion, in describing the Gibbs game: “Each unit is operated by a separate player who *competes* with players operating the other units of the multiple assembly.”

The trial court stated this salient fact in somewhat more forceful language as follows [R. 287]:

“The Gibbs game is played *strictly* on a *competitive* basis”

and then went on to explain that this was because

“ . . . the moment one winner has won, the play of the other stops automatically . . . and no time limit exists, . . . only one player may win and there is always a winner.”

The trial court also found [R. 287] that the new Fawn game was *not* competitive since, as it said:

“ . . . under the (new) Fawn game there can be *any number of winners*. . . .”

because in the new Fawn game

“ . . . the time clock automatically stops all games.”

As a result of these findings the trial court decided that since the new Fawn game was *not* competitive, and since claim 6 called for a *competitive* game, that therefore claim 6 and its dependent claims 7 and 8 were not infringed by the new Fawn game.

But then, through obvious inadvertence, the trial court ruled that claims 9 and 10 *which were expressly limited*

to a competitive game in almost the same language as used in claim 6, *were* infringed.

This of course, *on the face of it*, cannot be correct. Surely this court did not mean to put its stamp of approval on an error which is so clearly apparent from even a cursory comparison of claims 6 and 9.

The lower court also violated the basic fundamentals of patent law when it held that the new Fawn game infringed claim 3 which specifically calls for:

“supplementary means for indicating a winning play when all of the indicators in one of said groups has been energized.”

when there is obviously no supplementary signalling means of any kind in the new Fawn game.

It is believed that this Court did not intend by its application of Rule 52(a) to adopt as its own the foregoing errors of the Trial Court.

It is therefore respectfully submitted that a rehearing should be granted in this case to permit the Court to reconsider its stand on the above questions and also to reconsider its ruling with respect to the validity of the patent in suit and the question of infringement of the original Fawn game, both of which rulings are believed to be contrary to the facts of this case and the law of this Circuit.

SUMMARY OF ARGUMENT.

A.

Since the Trial Court Found That Claims 6, 7 and 8 Were Limited to a Competitive Game and Therefore Not Infringed by the New Fawn Game, It Follows as a Matter of Course That Claims 9 and 10, which Likewise Describe a Competitive Game, Cannot Possibly Be Infringed by the New Fawn Game.

1. THE TRIAL COURT HELD:

- (a) That Claims 6, 7 and 8 Were Limited to a Competitive Game;
- (b) That the New Fawn Game Was Not a Competitive Game; and
- (c) Therefore That the New Fawn Game Did Not Infringe Claims 6, 7 and 8.

2. CLAIM 9 LIKE CLAIM 6 IS EXPRESSLY LIMITED TO A COMPETITIVE GAME AND BY THE TRIAL COURT'S OWN REASONING IS NOT INFRINGED BY THE NEW FAWN GAME.

3. CLAIM 10 BEING DEPENDENT UPON CLAIM 9 IS NOT INFRINGED BY THE NEW FAWN GAME FOR THE REASONS ABOVE SET FORTH.

B.

The New Fawn Game Does Not Infringe Claim 3 of the Gibbs Patent Because It Omits One of the Essential Elements of Said Claim, To-Wit, the Supplementary Signal Means for Indicating a Winning Play.

1. CLAIM 3 BY ITS TERMS IS SPECIFICALLY LIMITED TO A GAME UNIT HAVING SUPPLEMENTARY SIGNAL MEANS FOR INDICATING A WINNING PLAY.
 - (a) In the Gibbs Game This Supplementary Signal Means Is the Electric Globe L at the Top of Each Game Unit.
 - (b) The Original Fawn Game Likewise Had an Electric Globe at the Top of Each Game Unit.
2. THE TRIAL COURT FOUND [R. 37] THAT THERE WERE NO "ELECTRIC GLOBES" (WIN SIGNALS) ON THE NEW FAWN GAME UNITS.
3. THEREFORE THE NEW FAWN GAME CANNOT POSSIBLY INFRINGE CLAIM 3 BECAUSE IT OMITTS AN ESSENTIAL ELEMENT THEREOF.

C.

The Original Fawn Game Did Not Infringe Any of the Gibbs Claims in Suit.

1. ALL OF THE GIBBS CLAIMS MUST BE LIMITED TO AN ELECTRICAL GAME IN WHICH RELAYS ARE EMPLOYED TO ENERGIZE THE INDICATOR LAMPS IN RESPONSE TO THE CLOSING OF SEPARATE CONTACT SWITCHES.
2. THE OLD FAWN GAME DID NOT EMPLOY RELAYS OR ANY EQUIVALENT THEREOF.
3. THEREFORE THE OLD FAWN GAME DID NOT INFRINGE ANY OF THE GIBBS CLAIMS BECAUSE AN ESSENTIAL ELEMENT THEREOF WAS OMITTED.

D.

All of the Gibbs Claims in Suit Are Invalid Over the
Prior Art of Record.

1. CLAIM 3 MERELY DEFINES A SINGLE UNIT OF THE GIBBS GAME WITHOUT LIMITATION AS TO WHERE THAT UNIT IS USED OR HOW, IF AT ALL, IT IS INTERCONNECTED WITH ANY OTHER GAME UNITS.

(a) When Construed as by the Trial Court, Each and Every Element of Claim 3 Is Found in the Prior Nakashima Patent,

(b) Therefore Claim 3 Is Anticipated by Nakashima.

2. CLAIMS 6 TO 10, INCLUSIVE, ARE INVALID FOR LACK OF INVENTION OVER NAKASHIMA IN VIEW OF THE COMPETITIVE GAME PATENTS ISSUED TO CHESTER, PRINA, HIGUCHI, ETC.

3. THERE WAS NO INVENTION INVOLVED IN INTERCONNECTING A PLURALITY OF OLD AND WELL KNOWN UNITS IN AN OLD AND WELL KNOWN MANNER.

(a) Consequently Claims 6 to 10 Are Invalid for Lack of Invention.

E.

Claims 9 and 10 Are Additionally Invalid Because by Their Terms They Describe a Game Different From the One Illustrated in the Gibbs Patent.

ARGUMENT.

A.

Since the Trial Court Found That Claims 6, 7 and 8 Were Limited to a Competitive Game and Therefore Not Infringed by the New Fawn Game Because It Was Non-competitive, It Follows as a Matter of Course That Claims 9 and 10, Which Like Claims 6, 7 and 8 Describe a Competitive Game, Cannot Possibly Be Infringed by the New Fawn Game.

Since this Court did not render an independent opinion in this case but merely adopted the lower court's opinion, it is necessary in this petition to direct our remarks to the trial court's opinion and the errors therein which this Court has adopted.

The opinion of the Trial Court was given orally from the bench upon the close of the trial. Since the Findings of Fact, Conclusions of Law and Decree all omit any mention of the fact that claims 6, 7 and 8 were held not to be infringed by the new Fawn game, we must turn to the Trial Court's statements from the bench for this information.

1. THE TRIAL COURT HELD:

- (a) That Claims 6, 7 and 8 Were Limited to a Competitive Game;
- (b) That the New Fawn Game Was Not a Competitive Game;
- (c) And Therefore, That the New Fawn Game Did Not Infringe Claims 6, 7 and 8.

Let us now examine some of the various statements made by the Trial Court relative to the above holdings.

In answering one of Mr. Huebner's remarks the Court stated [R. 262 and 263] as follows:

"The Court: I have in mind the principle you also have in mind, if a different result is obtained which is substantial, then there is no infringement, and if that result in the game is important, the question arises. That is why I think the question I have discussed should be more properly directed to you. *That is the fundamental distinction*, that while there is a possibility that several persons may win, and also the possibility that no one might win in his (the new Fawn) game, while your (Gibbs) game goes on until somebody wins. *So here are two differences in result*. His game stops automatically after a minute and a half. Your game goes on until somebody wins."

In response to further argument by counsel for Appellee, Judge Yankwich stated [R. 266] as follows:

"The Court: I don't quite get the trend of your thought. It seems to me that the latter part of that claim (claim 6), the wording would not be read on the altered (Fawn) game, as you call it, the new game, *because there is no de-energization, de-energization does not occur*, because the game goes on. In other words, in the second (Fawn) game, if the person wins, the play goes on until the clock strikes, while in your (Gibbs) game automatically the other players are left out in the dark as it were and the game stops.

"For that reason *I can't see how this latter part can be said to be anywhere read upon it*. If I understand correctly, the word 'de-energized' means that the electrical current which had operated on these units is off, or momentarily it does not have any effect."

At the close of its discussion of this problem the Court epitomized its views and stated its positive conclusion that there was an essential difference between the Gibbs game as defined in claim 6 and the new Fawn game, because the Gibbs game was competitive and the new Fawn game was not competitive. At R. 269 we find the Court stating as follows:

“I will put it this way, in non-electrical terms: the de-energizing takes place at a different time, and is not done automatically by the instrument itself, but by means of a clock, and at a future, which is a lapse of time depending not upon one winning alone having been completed, but a lapse of time depending upon an arbitrary time limit set by the operator.

“I have expressed it non-electrically, but it does seem to me that the addition and changing of results makes (claim) 6 clearly inapplicable. In other words, here is your danger: if you take a thing that achieved a different result, does it on a time basis, and does it by adding a new electrical apparatus which operates outside the machine, although it is connected with it, and you claim it is within the description, you are falling into the very pitfall which the Supreme Court adverted to in the Halliburton case, where you are claiming too broadly, and your claim becomes too broad by reason of indefiniteness.”

That the foregoing quotations from Judge Yandwich's remarks during the course of his discussion with counsel for Appellee fairly state his conclusion that *the Gibbs game was a competitive game while the new Fawn game was not a competitive game*, is borne out by the latter

part of his oral opinion commencing on R. 287 where we find the following:

“* * * , the (new) Fawn game is played for a definite time—a minute and a half, making it possible for two persons to win during the course of the game, one after the other. *The Gibbs game is played strictly on a competitive basis*, and the moment one winner has won, the play of the other stops automatically, and this automatic stop is achieved by the electrical mechanism itself, and no time limit exists.

“The result is that under the (new) Fawn game there can be any number of winners, and it is possible that no one should win, during that time, while under the Gibbs game only one player may win, and there is always a winner, because the game does not stop until one person has won. In the other (new Fawn) game as I have already stated, the time clock automatically stops all games and the clock is connected with a mechanism as an instrument complete in itself, which is outside of the construction itself.

“* * * *I do not think that claim 6 is infringed (by the new Fawn game)* and I think if you read them the way counsel desires me to read them, they would fall under the interdict of the recent decision of the Supreme Court in *Halliburton v. Walker*.”

It is abundantly clear therefore from the foregoing quotations that the Trial Court not only found once but several times that:

- (a) The Gibbs game as defined by claim 6 is a competitive game because when one player wins, *the other game units are automatically deenergized* thus making it impossible to have more than one winner;

- (b) The New Fawn game is not a competitive game because *the other game units are not deenergized* when a win is made on one unit, but on the contrary they continue to operate for a time fixed by the clock so that there may be several winners;
- (c) Therefore the new Fawn game does not infringe claim 6 (or its dependent claims 7 and 8).

2. CLAIM 9 LIKE CLAIM 6 IS EXPRESSLY LIMITED TO A COMPETITIVE GAME AND BY THE TRIAL COURT'S OWN REASONING IS NOT INFRINGED BY THE NEW FAWN GAME.

As stated by the Trial Court, the Gibbs game is competitive because a win on one of the game units disconnects the other units so that the indicator lamps thereof may not thereafter be illuminated by the competing players. In other words, the players play against each other. The means for accomplishing this result is set forth in claim 6 as follows:

“means whereby when all of the indicators in any group of any of said units have been operated to complete a winning play, *the indicators on all of the units except the winning unit will be de-energized.*”

In claim 9 this element is described as:

“means controlled by the closing of the signal circuit of the winning unit for discontinuing the signals and *opening the circuit of the indicators of all the other units.*”

By a simple comparison of the above language in claims 6 and 9, it is obvious that these claims describe exactly the same structure, to-wit: the element in the Gibbs game which makes it a competitive game.

In view of the very clear rulings of the Trial Court that *the new Fawn game does not have the competitive feature of claim 6, it is obvious that the new Fawn game cannot possibly infringe claim 9 which includes that same feature.* The old axiom of geometry that “things equal to the same thing are equal to each other” applies equally in the field of law.

Since the Trial Court ruled that the new game was non-competitive and therefore did not infringe claim 6, it was an obvious mistake on the part of the Court to rule that claim 9 which also calls for a competitive game was infringed by the new Fawn game.

This Court should not confirm a ruling *that is illogical and inconsistent on its face!*

3. CLAIM 10 BEING DEPENDENT UPON CLAIM 9 IS NOT INFRINGED BY THE NEW FAWN GAME FOR THE REASONS ABOVE SET FORTH.

Claim 10 reads as follows:

“a game apparatus as characterized in claim 9, including an audible signal commonly connected with all of said units * * *”

It is axiomatic that a claim written in dependent form incorporates by reference all parts of the claim from which it depends. In other words, claim 10 as written, is merely an abbreviated form of claim 9 plus the additional element of the audible signal.

Consequently, since claim 9 is not infringed by the new Fawn game, claim 10 cannot be infringed either. As matter of fact, claim 10 is additionally not infringed because the new Fawn game does not have an audible sig-

nal. However, since we do not need any additional reasons for our position it will not be discussed.

We respectfully submit that the confirmation by this Court of a decree that is illogical and inconsistent on its face is adequate grounds for granting a rehearing. To do otherwise would be a gross miscarriage of justice.

B.

The New Fawn Game Does Not Infringe Claim 3 of the Gibbs Patent Because It Omits One of the Essential Elements of Said Claim, To-wit, the Supplementary Signal Means for Indicating a Winning Play.

It is elemental patent law that the omission of an element of a claim avoids infringement of that claim. As stated by this Court in the case of *Dunkley v. Central Calif. Canneries*, 7 F. 2d 972,

“A defendant who omits one of the material elements of the combination does not infringe.”

This basic doctrine was again stated by this Court in somewhat similar language in the case of *Magnavox Co. v. Hart & Reno*, 73 F. 2d 433, 23 U. S. P. Q. 211, as follows:

“If the defendant omits one or more of the material elements which make up the combination, he no longer uses the combination; and it is no answer to say that the omitted elements are not essential, and that the combination operates as well without them as with them.”

1. CLAIM 3 BY ITS TERMS IS SPECIFICALLY LIMITED TO A GAME UNIT HAVING SUPPLEMENTARY SIGNAL MEANS FOR INDICATING A WINNING PLAY.

In the Gibbs game a win by any player is indicated by instant illumination of a supplementary electric globe L on the top of the winner's game unit. The importance of this win signal is stressed throughout the Gibbs specification, as for example, on page 2, at line 78 [R. 304] where it is described as a "supplementary indicator lamp L," and again on page 4 at line 54 [R. 306], where it is referred to as "the master indicator L." In claim 3 it is described as follows:

"supplementary means for indicating a winning play when all of the indicators in one of said groups have been energized."

That Gibbs considered the win signal a very important element of his invention is indicated by the large number of times that it is mentioned in the specification. Even the Trial Court adverted to this feature in quoting from the preamble of the Gibbs specification [R. 286] as follows:

"* * * and the winning play made by any one of the players on a particular unit will operate to give an additional signal of such winning play,
* * *"

The original Fawn game like the Gibbs game had an electric globe [numeral 22, R. 325] at the top of each unit to visually indicate a win on that unit. We agree with Appellee that this electric globe in the old Fawn game was the signal lamp L called for in Gibbs' claim 3. However, *there is no such signal in the new Fawn game!*

2. THE TRIAL COURT FOUND [R. 37] THAT THERE WERE NO "ELECTRIC GLOBES" (WIN SIGNALS) ON THE NEW FAWN GAME UNITS.

In view of the fact that the Findings as prepared by the Appellee were signed by the Trial Court without change, the Appellee cannot be heard to say that the omission in the new Fawn game of the "electric globes at the top of each unit of" the old Fawn game does not constitute *omission of the win signal L called for by claim 3* of the Gibbs patent. The situation is simply this:

- (a) Gibbs claim 3 calls for a supplementary win signal;
- (b) The old Fawn game had such a signal;
- (c) The new Fawn game does not have such a signal;
- (d) Therefore the new Fawn game cannot possibly infringe claim 3, because it omits an essential element thereof.

It is fundamental patent law that the omission of an essential element from a claim avoids infringement of that claim. (See Law Points in the Supplement of our Opening Brief.)

Since there are no win light globes on the new Fawn game units as called for by claim 3, there can be no infringement of claim 3 by the new Fawn game. The Trial Court and this Court have clearly committed error in not so holding, and a rehearing should be granted to rectify that error.

C.

The Original Fawn Game Does Not Infringe Any of the Gibbs Claims in Suit.

This point was of course discussed at considerable length in Appellant's Opening Brief, and will only be treated briefly in this Petition. However, it is our position that the Trial Court erred as did this Court in finding infringement by the old Fawn game.

1. ALL OF THE GIBBS CLAIMS MUST BE LIMITED TO AN ELECTRICAL GAME IN WHICH RELAYS ARE EMPLOYED TO ENERGIZE THE INDICATOR LAMPS IN RESPONSE TO THE CLOSING OF SEPARATE CONTACT SWITCHES.

The Gibbs switches which are operated by the ball dropping through holes on the playing board do not energize the indicator lamps, but on the contrary, energize an intermediate electric relay which in turn energizes the indicator lamps and keeps them energized during the play. In other words, Gibbs, in order to operate his twenty-five lights employs twenty-five separate relays in addition to his twenty-five separate switches. This is clearly brought out in the Gibbs specification and claims.

The only way that the claims in suit can be held valid is to limit them to the said relays. Unless so limited, the claims read squarely on the prior art. If so limited, the claims are not infringed by the Old Fawn game, or by the new game either.

2. THE OLD FAWN GAME DID NOT EMPLOY RELAYS OR ANY EQUIVALENT THEREOF.

The old Fawn game instead of using the relay type electrical circuit employed by Gibbs (which was well known in the art prior to Gibbs' time) employed an over-balanced switch. By this simple expedient the Appellant avoided having to use the twenty-five relays of the Gibbs game.

As indicated by the prior art, there are many ways of accomplishing the end-result of the Gibbs patent, only one of which ways is shown and claimed by Gibbs. The Appellant used a different means for accomplishing illumination of his indicator lamps, said means being a variation of the Nakashima system.

There are no relays, or any equivalent thereof in either of the Fawn games.

3. THE OLD FAWN GAME DID NOT INFRINGE ANY OF THE GIBBS CLAIMS BECAUSE AN ESSENTIAL ELEMENT THEREOF HAS BEEN OMITTED.

This conclusion follows inescapably from the facts set forth above. It is felt that the Trial Court in finding infringement of the Gibbs patent by the old game was clearly in error. This Court has confirmed that error without substantial comment.

D.

**All of the Gibbs Claims in Suit Are Invalid Over the
Prior Art of Record.**

In reaffirming the doctrine set forth in *Klein v. City of Seattle*, 77 Fed. 200, this Court in the more recent case of *Keszthelyi v. Doheny Stone Drill Co.*, 59 F. 2d 3, 13 U. S. P. Q. 427, stated as follows:

“A patent must combine utility, novelty and invention. It may in fact embrace utility and novelty in a high degree, and still be only the result of mechanical skill as distinguished from invention . . . It is not enough that a thing shall be new . . . and that it shall be useful, but it must under the constitution and statute, amount to an invention or discovery.”

1. **CLAIM 3 MERELY DEFINES A SINGLE UNIT OF THE GIBBS GAME WITHOUT LIMITATION AS TO WHERE THAT UNIT IS USED OR HOW, IF AT ALL, IT IS INTERCONNECTED WITH ANY OTHER UNITS.**

From the statements of the Trial Court it is apparent that the Court was confused and did not realize the above fact. When it is remembered that claim 3 has no relation whatsoever to the method of interconnecting a number of game units but reads on a single game unit isolated from the balance of the Gibbs' disclosure, it is readily seen that the broad construction given to claim 3 by the Trial Court makes the claim read directly on the prior art patent to Nakashima.

If claim 3 is limited to relays as the Patent Office Examiner very clearly thought it was, then the claim does not read on the Nakashima patent; but by the same token it does not read on either the old or new Fawn games.

The Appellee, the Court below and this Court have all chosen to give claim 3 a broad interpretation in order to find infringement of the old Fawn game. By this interpretation claim 3 is clearly invalid since each and every element thereof is met by Nakashima.

2. CLAIMS 6 TO 10, INC., ARE INVALID FOR LACK OF INVENTION OVER NAKASHIMA IN VIEW OF THE COMPETITIVE GAME PATENTS ISSUED TO CHESTER, PRINA, HIGUCHI, ETC.

Claims 6 to 10 define the complete Gibbs aggregation, to-wit, a plurality of his individual claim 3 units interconnected in a manner such that when a win is made on one unit, all of the other units are immediately disconnected. This concept was old in the art long prior to Gibbs as clearly shown in the above-mentioned patents and the other competitive game patents discussed in Appellant's Briefs.

Since prior to Gibbs the individual units were old as shown by the Nakashima patent and since the method of interconnecting a plurality of these units in the manner claimed by Gibbs was old as shown in the Chester, Prina, Higuchi and other competitive game patents, it certainly did not involve any invention to assemble a plurality of the Gibbs individual units into a bank as recited in claims 6 to 10, inclusive.

Consequently, it is apparent that claims 6 to 10 are invalid for lack of invention over the prior art and should have been so held by the Trial Court. It is submitted that the Trial Court committed error in holding the Gibbs patent valid and that this Court has by affirming the lower court decision, committed the same error.

E.

Claims 9 and 10 Are Additionally Invalid Because by Their Terms They Describe a Game Different From the One Illustrated in the Gibbs Patent.

This subject was gone into thoroughly in Appellant's Briefs. Even a cursory reading of the claims and a comparison of them with the disclosure of the Gibbs patent illustrates the correctness of the above statement. Very obviously claim 9 does not read on the patentee's own disclosure. As a result thereof claim 9 is invalid as contrary to the statutes. This is elemental patent law as set forth in Appellant's Law Points in his Opening Brief.

It is believed that this Court will wish to re-examine claims 9 and 10 to ascertain the correctness of the above statements.

Conclusion.

We respectfully submit that this Court by its adherence to Rule 52(a) has reached conclusions on all of the issues mentioned which are contrary to both the facts and the law of the case. It is consequently urged that a rehearing be granted herein and that Appellant be granted the opportunity of further briefing and arguing the points which we believe clearly show the Gibbs patent to be both invalid and not infringed.

While the matters of validity and infringement by the *old* Fawn game may be said to be controversial, there can be no real controversy with respect to the *new* Fawn game.

The lack of infringement by the new Fawn game is so clear under the trial court's own rulings that simple justice requires a rehearing in this case to permit this Court to correct the inconsistency in the decree below.

Respectfully submitted,

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Certificate.

It is hereby certified that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for delay.

ROBERT W. FULWIDER.

